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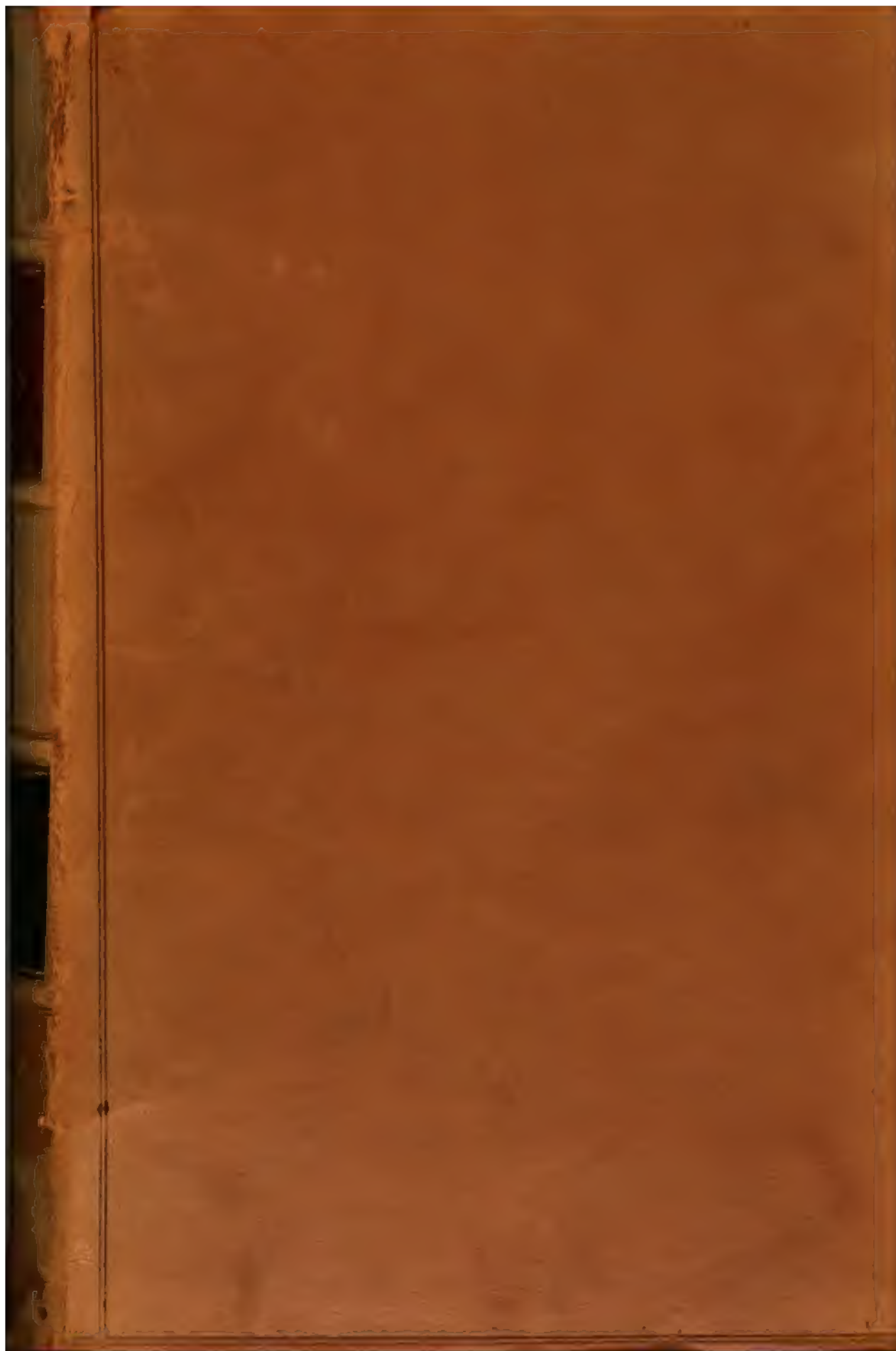
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A TREATISE
ON
INJUNCTIONS
AND OTHER
EXTRAORDINARY REMEDIES

COVERING

**HABEAS CORPUS, MANDAMUS, PROHIBITION, QUO
WARRANTO, AND CERTIORARI
OR REVIEW**

**CONTAINING AN EXPOSITION OF PRINCIPLES GOVERNING THESE SEVERAL
FORMS OF RELIEF, AND THEIR PRACTICAL USE; WITH
CITATIONS OF ALL THE AUTHORITIES TO DATE**

BY

THOMAS CARL SPELLING

Second Edition

REVISED AND ENLARGED

IN TWO VOLUMES

VOL. I

BOSTON
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1901

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TO

ARTHUR RODGERS,

OF THE SAN FRANCISCO BAR,

**THAN WHOM THERE IS NO HIGHER TYPE OF THE HONORABLE AND
SUCCESSFUL LAWYER,**

THIS WORK IS RESPECTFULLY INSCRIBED BY

THE AUTHOR.

PREFACE TO SECOND EDITION.

THE favorable reception of the original publication of this work, evinced by a considerable and widely distributed demand for it, has encouraged the publishers to issue a revised, or second, edition.

Although the utmost care and unsparing labor were devoted to the preparation and publication of the first edition, there was, as is ever the case, room for numerous and important improvements. The changes which are of the most practical importance consist in the addition of new illustrations and adaptations of principle, furnished by courts of last resort. Not every case reported since the first edition has been added, but all have been added which in the opinion of the author enhanced the value of the work generally, or furnished light to the practitioner or judge within particular jurisdictions. Where it was found necessary to add a new section, it was given the number of the next preceding section, with the addition of the letter "a," so that the numerical order of the first edition is not disturbed.

Though almost unnecessary, the profession is reminded of recent important extensions of jurisdiction to grant the writ of injunction. No expression is given herein as to the soundness, or unsoundness, of judicial interpretation of judicial power in such cases, but such extensions, and illustrations thereof, will be found fully noted herein, in proper connection. The same course has been pursued in the revision of the other subjects. The increasing demand for remedies affording immediate relief from civil wrongs, threatened, or irremediable if redress be long delayed, in the whirl

in a form most attractive and convenient, is the object of these volumes. It is taken for granted that a thorough and painstaking synthesis of principle and precedent on the several matters herein discussed will prove of practical and lasting benefit alike to judges, members of the bar, and students. On the important subject of certiorari there has been heretofore nothing published in the form of a text-book, nor has any serious attempt been made to treat systematically of habeas corpus.

In order to attain the utmost completeness and utility, the author has not contented himself with a general statement of the grounds for granting each of the extraordinary remedies and the general principles governing their use, but has described many peculiarities of local jurisdiction and practice.

It is thought that the frequent insertions of side heads, indicating at a glance the subject illustrated, enhance the practical value of the notes, and will be appreciated accordingly. For convenience the index is arranged in two parts corresponding with the two grand divisions of the work.

T. C. SPELLING.

SAN FRANCISCO, May, 1893.

INTRODUCTORY.

THE word "extraordinary," when used to describe a legal or equitable remedy, as in other connections, is self-definitive; but the occasions which authorize the employment of an extraordinary rather than an ordinary remedy, the particular and most appropriate for the occasion of the several that are known, and the manner of obtaining and applying it in a given case, are matters which it is often important, and sometimes difficult, to readily determine upon the spur of the moment.

That ordinary remedies are inadequate and unavailing usually arises from the fact that the danger to be averted is imminent, or that the lapse of time until they can be obtained would be equivalent to a denial of all remedy. This is especially true of injunction, mandamus, and prohibition. Hence the value and necessity of knowledge within easy reach and in convenient shape when the practitioner is confronted with a case to meet which there is no ordinary redress, or in which a resort to the courts for obtaining it will be equivalent to advising submission to grievous wrong.

All extraordinary remedies, whether legal or equitable, are justified, and the jurisdiction to administer them is based upon one or more of three grounds: First, the urgency of the case; second, the inadequacy of ordinary remedies; and third, the non-existence of any ordinary remedy whatever.

Sometimes a party will be entitled to more than one extraordinary remedy in the same case; often he will require ordinary as well as extraordinary relief; and there is frequently a concurrence of more than one of the grounds for granting extraordinary relief.

Therefore it is not exactly proper to say, as is sometimes said, that the absence or unavailability of all ordinary remedies must

be made to appear in order to justify an extraordinary remedy. It is only necessary that some phase of the case should lie beyond the reach of ordinary methods of redress. Suppose, for instance, the shares of a stockholder in a corporation — which have not acquired a market value, but upon which dividends have been declared — have been illegally declared forfeited, his name has been erased from the list of shareholders, and the shares have been advertised by the agents of the corporation for sale, and are about to be sold. He will be entitled, owing to the urgency of the case, to a temporary injunction to restrain the sale, and, for want of ordinary adequate remedy, to a writ of mandamus to have his name restored to the list of shareholders, and to an ordinary remedy in the form of an action at law or an accounting in equity, for the accrued dividends. Whether all these remedies are obtainable in the same suit, and whether legal and equitable relief may be demanded in, and granted by the same court, and upon a single complaint or petition, will depend upon the partition of jurisdiction which has been made in the particular state.

Thus it is seen that the line which separates our subject from the great body of remedial jurisprudence is not sharply drawn, and that the legal principles to be considered are neither few nor the simplest. It will also be seen that there is not such a resemblance, either in the nature of extraordinary remedies or in the methods of procedure by which they are enforced, as to render generalization either proper or feasible.

And yet there are certain fundamental rules common to all extraordinary remedies. These are few and simple in statement, but in their application capable of almost infinite elaboration. The principal ground of the jurisdiction to grant extraordinary relief, either by injunction, mandamus, prohibition, or review, is the absence of judicial instrumentalities exactly answering the demands and necessities of the case, and the danger of great or irreparable injury resulting to a party unless aided by an extraordinary remedy. If the danger consists in the doing of an act which it is the duty of the party complained against not to do, a preventive remedy in the form of an injunction is administered. If the evil threatened consists in the refusal of some court, officer, or person occupying a

quasi-official position, to perform a duty, the appropriate form of relief is compulsory, and a mandamus issues. If the injury threatened consists in the illegal usurpation of jurisdiction by a court, the extraordinary relief granted is a writ of prohibition, whose purpose and nature are indicated by its name. If the injury has been already done by usurpation of jurisdiction from which no appeal or other ordinary corrective remedy is afforded by the law, the writ of review or certiorari, which differs from those just mentioned in the respect that it is inquisitorial and corrective rather than directly remedial in its nature, is the proper form of relief. Quo warranto would appear, without serious examination, to be in all respects *sui generis* among extraordinary remedies; but a careful study of the nature of the remedy and the methods pursued in administering it, as well as the occasions calling for its employment, will disclose that the real ground of jurisdiction in quo warranto is, as in other species of extraordinary relief, an injury irreparable by ordinary methods of legal procedure. It is true that the injury for which this remedy is invoked is presumptively done to the public, and that generally the proceeding must be instituted and conducted in the name of the state, and not in the name of a private party, as when an injunction is sought; but this very necessity is evidence of the total absence, or at least the inadequacy, of ordinary legal remedies, since, though every citizen may be injured, the impossibility of estimating or taking cognizance of the injury done to any one so as to give him a standing in court as a party litigant, proves the inadequacy of the law to afford redress in any ordinary form of action.

Injunction is by far the most important extraordinary remedy. Either for an auxiliary or as a principal object, the preventive power of courts is invoked nearly as often as their ordinary remedial functions. Still, the leading principles governing the use of the injunctive or restraining arm of courts of equitable jurisdiction are few, easily stated, and well settled upon authority; and while the cases calling for their application are various and almost numberless, yet they are not difficult of classification.

After a chapter devoted to accounting for the origin of and defining injunction, and outlining the jurisdiction, various branches

of the jurisdiction are minutely elaborated in as many separate chapters. Then a few chapters are devoted to practice and pleading. The other subjects are treated in much the same way.

There are other important processes of an extraordinary character, such as attachment at law and sequestration in equity; but these are not treated herein, for two reasons: first, neither of these are remedial, but simply auxiliary and ancillary to the main objects of the actions in which they are employed; second, separate works have already been devoted to each of these subjects, sequestration being covered by works on receivers.

ABBREVIATIONS OF PERIODICALS AND REPORTERS.

A.	Atlantic Reporter.
Alb. L. J.	Albany Law Journal.
Am. L. Rev.	American Law Review.
Cent. L. J.	Central Law Journal.
F.	Federal Reporter.
N. E.	Northeastern Reporter.
N. or N. W.	Northwestern Reporter.
N. Y. S.	New York Supplement.
N. Y. St. R.	New York State Reporter.
P.	Pacific Reporter.
S. Ct.	Supreme Court Reporter.
S. E.	Southeastern Reporter.
S. W.	Southwestern Reporter.
So.	Southern Reporter.
W. N. C.	Weekly Notes of Cases.

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EXTRAORDINARY RELIEF.

PART I. — BY INJUNCTION.

WRONGS PREVENTED.

CHAPTER I.

DEFINITIONS AND GENERAL PRINCIPLES.

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| <p>§ 1. Definition.</p> <p>2. Early Origin — Analogy to Roman Interdicts.</p> <p>3. Office of Injunction.</p> <p>4. Inadequacy of Common-law Remedies.</p> <p>5. Range of Objects.</p> <p>6. Granting the Exercise of Original Jurisdiction.</p> <p>7. Conflict of Jurisdiction.</p> <p>8. Territorial Limits of Jurisdiction.</p> <p>9. Statutory Regulations of Jurisdiction.</p> <p>10. Cannot be employed retroactively.</p> <p>11. Generally preventive — rarely mandatory.</p> <p>12. Injury threatened must be actual and impending.</p> <p>13. And irreparable at Law.</p> <p>14. Same Subject continued.</p> <p>15. Writ not granted where Grievance available as Defence at Law.</p> <p>16. Remedy at Law must reach Necessities of the Case.</p> <p>17. Jurisdiction in Federal Courts.</p> <p>18. Imminency of Danger which will justify the Writ.</p> <p>19. Not granted for mere Technical Invasion of, or Slight Injury to Plaintiff's Rights.</p> <p>20. The Right must be clear.</p> | <p>§ 21. Not granted when Legal Rights are unsettled at Law.</p> <p>22. Court's Discretion to grant or refuse Relief.</p> <p>23. Writ refused where Cause of Justice would be retarded or defeated by granting it.</p> <p>24. Not a Remedy to prevent Crime or to preserve Morality.</p> <p>25. Only granted upon Positive Allegations.</p> <p>26. Party seeking Relief must not be himself at fault.</p> <p>27. Considered with Respect to Period of Duration.</p> <p>28. Injunction <i>pendente lite</i>.</p> <p>29. Notice to Defendant as affecting Sufficiency of Allegations.</p> <p>30. When Court will enjoin without Special Application.</p> <p>31. Preliminary, or interlocutory, and perpetual distinguished.</p> <p>32. Preliminary Injunction not granted to decide Ultimate Rights of Parties.</p> <p>33. Subdivisions of Preliminary Injunctions.</p> <p>34. When granted to Defendant.</p> <p>35. Essentials of the Writ.</p> |
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§ 1. Definition. — The common-law definition of injunction as given by an able exponent of equity jurisprudence it would be difficult to improve upon, and requires but little or no modifica-

tion: "A writ framed according to the circumstances of the case, commanding an act which the court regards essential to justice, or restraining an act which it esteems contrary to equity and good conscience."¹ The writ has a purely personal effect, and has been well described as "a judicial process operating *in personam*."²

§ 2. **Early Origin — Analogy to Roman Interdicts.** — The antiquity of this writ is no less than that of equity as a distinctive branch of administrative justice. Indeed it may be regarded in the light of a virtual rescript of the prætorian interdict of the Roman civil law.³

Pursuing the analogy between Roman interdicts and injunctions, we find the former divided into three sorts: *prohibitory*, *restitutory*, and *exhibitory*. Prohibitory, were those most commonly

¹ Jeremy's Eq. 307. For other definitions see 2 Story's Eq. 861; Burr. Law Dict.; Bouv. Law Dict. Mr. Story says: "A writ of injunction may be described to be a judicial process, whereby a party is required to do a particular thing or to refrain from doing a particular thing according to the exigency of the writ;" and of Jeremy's definition he remarks in a note: "If one were disposed to be scrupulously critical on such a subject, he might object to the apparent contrast between justice in the first part of the sentence and equity and good conscience in the latter. The truth is that in this connection the words have the same identical meaning."

² McDonough v. Calloway, 7 Rob. (La.) 442; Childress v. Perkins, Cooke (Tenn.), 87.

³ Story's Eq. Jur. (12th ed.) sec. 51; Halifax's Rom. Civ. L. ch. 6, p. 102. The term "interdict" was used in the Roman law in three distinct but cognate senses. In the first place, it was often used to signify the edicts made by the prætor by which he declared his intention to give the remedy in certain cases, generally to preserve or restore possession. Then it was termed an *edictal*. In the second place, it was sometimes employed to signify his order or decree applying the remedy in the given case before him, and was termed *decretal*. And finally, it was used to signify the very remedy sought in the suit commenced under the prætor's edict, and thus became identified in name with the action itself. Livingstone on the Batture case, 5 American Law Journal, 271, 272; Brisson de Verb. Sig. *interdictum*; Vicat, Vocab. *interdictum*; Heinecc. Elem. Pand. Ps. 6. "It is in the latter sense," says Story, "that the interdict of the Roman law bears a resemblance to the injunctions of courts of equity. It is said to have been called interdict because it was originally interposed in the nature of an interlocutory decree between two parties contending for possession, until the property could be tried. But afterwards the appellation was extended to final decretal orders of the same nature." Story's Eq. Jur. (12th ed.) sec. 866. The following definition of such orders is given: "Interdicts were certain forms of words by which the prætor either commanded or prohibited something to be done; and they were chiefly used in controversies respecting possession or *quasi* possession." Inst. Lib. 4, tit. 15, Introd.

in use. In this form the prætor forbade something to be done ; as when he forbade force to be used against a lawful possessor. By the *restitutory* writ, he directed something to be restored to any one who had been ejected from the possession by force. The office of the *exhibitory* form was to compel a person or thing to be produced.¹ It will be seen that the only form of interdict corresponding with the form of injunction chiefly in use at the present day was the prohibitory form. Indeed it is stated in the Institutes that the term "interdict" was properly applicable to this form only because to interdict is properly to denounce or prohibit ; and that the restitutory and exhibitory interdicts should properly be called decrees, but that by usage they are called interdicts because they are pronounced between two persons.² These interdicts were, after a time, superseded by what were called extraordinary actions, in which judgment was pronounced without a preceding interdict after the manner of a beneficial action given in consequence of an interdict.³ But it is plainly apparent that, while they were in use, Roman interdicts partook very much of the nature of injunctions in courts of equity, and were applied to the same general purposes. They were employed to restrain undue exercise of rights, to prevent threatened wrongs, to restore violated possessions, and to secure the permanent enjoyment of the rights of property.

§ 3. Office of Injunction. — Without the power to prevent as well as to undo wrongs, to restrain as well as to compel action, to preserve as well as to reinstate the status of persons and things, courts of equity would possess but little power, and command but little respect as dispensers of justice and arbiters between man and man. The important restraining function is given effect by the great extraordinary remedy of injunction, which may be appropriately termed the strong arm of courts of equity. Its office is to require a party to do or refrain from doing a particular thing according to the exigency of the occasion as indicated on the face of the writ. A court of equity has no power, before the final hearing, or otherwise than by a decree, to order a

¹ Inst. Lib. 4, tit. 15, 1 ; Heinecc. Elem. Pand. Ps. 6, Lib. 43, 285, 286, 287 ; Halifax on Civ. Law, ch. 6, p. 101 ; Dig. Lib. 43, tit. 11, 1, 2 ; Pothier, Pand. Lib. 43, tit. 1, 1 to 16 ; Vicat, Vocab. voce *interdictum*.

² Inst. Lib. 4, tit. 15, sec. 1.

³ Inst. Lib. 4, tit. 15, sec. 8.

party to undo what he has done.¹ Nor should it be employed in lieu of other extraordinary remedies more appropriate to give the relief required.²

Usually the sole purpose of granting a preliminary injunction is to stop the mischief complained of pending the action, and keep things as they are until the final hearing, when the questions involved may be finally disposed of and full justice done to all parties interested.³

§ 4. **Inadequacy of Common-law Remedies.** — Although courts of law sometimes exercise analogous powers, by writ of prohibition, yet the writ of injunction is peculiar to courts of equity. But even in cases of waste, when the common-law writ of prohibition or *estrepement* was most commonly employed, this was found so utterly inadequate for the purposes of justice, that the process had early in the present century fallen into disuse, and Justice Story said: "Almost all the remedial justice of this sort is now administered through the instrumentality of courts of equity."⁴

The jurisdiction in these courts, then, has its true origin in the fact that there is either no remedy at all at law, or the remedy is imperfect or inadequate. Nor, on the other hand, is the granting of an injunction limited to a case where damages could be recovered in an action at law.⁵ The jurisdiction was, for a long time, most pertinaciously resisted by the courts of common law; especially when it was sought by an injunction to stay suits and judgments in these courts. But it was firmly established in the

¹ *Bradbury v. The Manchester, Sheffield, & Lincolnshire R. R. Co.*, 8 Eng. Law & Eq. 143; *Washington University v. Green*, 1 Md. Ch. Dec. 97.

² *Ottaquehee Woolen Co. v. Newton*, 57 Vt. 451, holding that equity will not grant an injunction which would indirectly act as a forfeiture of a charter even if the franchise might be adjudged forfeited by non-user, since a forfeiture can only be enforced in an action at law in the name of the state. On same principle an injunction should not be granted to restrain the illegal incorporation of a village. *Willis v. Stapels*, 30 Hun (N. Y.), 644.

³ *Parker v. Winnipiseogee, etc. Co.*, 2 Black (U. S.), 545; *Irwin v. Dixon*, 9 How. (U. S.) 28; *Great W. R. Co. v. Birmingham, etc. R. Co.*, 2 Ph. 602. But when the complaint shows no cause of action, a preliminary injunction is unauthorized and the granting of it is an error of law. *Allen v. Meyer*, 73 N. Y. 1; *Wright v. Brown*, 67 N. Y. 1; *Collins v. Collins*, 71 N. Y. 270; *Paul v. Munger*, 47 N. Y. 469.

⁴ Story's Eq. sec. 864; Eden on Injunct. ch. 9, pp. 158, 159, 160; 3 Wooddes. Lect. 56, p. 399; Com. Dig. Chancery, D. 11.

⁵ *Schuyler v. Curtis*, 15 N. Y. S. 787.

reign of King James I., upon an express appeal to that monarch, and is now in constant and unquestioned exercise.¹

§ 5. **Range of Objects.** — The range of purposes for which this remedial writ may be invoked is almost infinite; and it would be impracticable even in a work devoted exclusively to the subject to consider every proper occasion for its employment. A learned English writer on the subject has enumerated the most ordinary objects of the writ as follows: "To stay proceedings in courts of law, in the spiritual court, the courts of admiralty, or in some other courts of equity; to restrain the endorsement or negotiation of notes and bills of exchange, the sale of land, the sailing of a ship, the transfer of stock, or the alienation of a specific chattel; to prevent the wasting of assets or other property pending litigation; to restrain a trustee from assigning the legal estate, or from setting up a term of years, or assignees from making a dividend; to prevent the removing out of jurisdiction, marrying, or having any intercourse which the court disapproves of, with a ward; to restrain the commission of every species of waste to houses, mines, timber, or any other part of the inheritance; to prevent the infringement of patents, and the violation of copyright, either by publication or theatrical representation; to suppress the continuance of public or private nuisances; and, by the various modes of interpleader, restraint upon multiplicity of suits, or quieting possession before the hearing, to stop the progress of vexatious litigation." But he immediately adds: "These, however, are far from being all the instances in which this species of interposition is obtained. It would, indeed, be difficult to enumerate them all, for in the endless variety of cases in which a plaintiff is entitled to equitable relief, if that relief consists in restraining the commission or the continuance of some act of the defendant, a court of equity administers it by means of the writ of injunction."²

¹ Story's Eq. Jur. sec. 864.

² Eden's Injunct. pp. 1, 2. Where there is a conspiracy to defeat a deed on the false ground that it is forged, equity will enjoin the conspirators from making and accepting deeds with the intention of conveying to innocent purchasers. *Palo Alto Banking, etc. Co. v. Mahar*, 65 Iowa, 74. Equity will protect the rights of an equitable owner of an interest the legal title to which is in assignees in bankruptcy, from threatened injury. *Williams v. Wadsworth*, 51 Conn. 277. As the Constitution of Louisiana has placed certain limitations on the legislative power to create new parishes, the courts have jurisdiction to enjoin the execution of acts for their creation which are alleged

It is proposed in the part of this treatise devoted to injunction to give an exposition and illustration of the most important subjects calling for the exercise of this branch of equity jurisdiction, together with an elaboration of all the principles governing courts in resorting to the remedy; and, finally, to arrange and state systematically the rules of practice of general application, and, as far as possible, those of special and local adaptation.

§ 6. **Granting the Exercise of Original Jurisdiction.** — The granting of injunctions is the exercise of original and not of appellate jurisdiction; therefore, a court of last resort, whose jurisdiction is limited by a state constitution, will not grant injunctions in cases pending in the inferior courts where this power is not expressly granted by the constitution.¹ An act of the legislature where such constitutional provisions exist, seeking to confer upon appellate courts jurisdiction over matters of injunction, is unconstitutional.² The obvious tendency of legislation is to limit the exercise of this branch of jurisdiction by the highest courts to cases *publici juris*, and not to extend relief in cases of merely private right, wherein the judgment affects only private parties.³ Nor is it regarded as alone sufficient to set in motion such original jurisdiction that the matter is *publici juris*, but it should also be one which affects the sovereignty of the state, its franchises or prerogatives, and one in which the interest of the state is primary

to be in violation of the constitutional restrictions. *State v. Ellis*, 42 La. An. 1104; 8 So. 305.

¹ The reasoning in support of this rule is very clearly advanced by Thurman, J., in *Kent v. Mahaffy*, 2 Ohio St. 498: "That we can allow an injunction in a case pending in this court upon an appeal, is very clear. An injunction may be the very object of the suit, the final decree sought; and so a provisional injunction, during the pendency of the suit, may be necessary for the purposes of justice. The power to allow these is a part of the appellate jurisdiction, the granting of which is authorized by the Constitution, and has been made by the law. But to allow an injunction in a case pending in another court would be an exercise of original, and not of appellate jurisdiction. Now the original jurisdiction conferred upon this court by the Constitution is limited to *quo warranto*, *mandamus*, *habeas corpus*, and *procedendo*. Article 4, sec. 2. It would be wholly inconsistent with, and in a great measure destructive of, the judicial system it ordains, to suppose that this original jurisdiction can be enlarged by law. It is true there is no express prohibition against it, but none was necessary." See also *Commissioners of Crawford County (Ind. Sup.)* 40 N. E. 1089; *Thigpen v. Aldridge*, 92 Ga. 563.

² *Campbell v. Campbell*, 22 Ill. 664; *Bryant v. People*, 71 Ill. 82.

³ *Attorney-General v. The Railroad Companies*, 85 Wis. 425; *Attorney-General v. City of Eau Claire*, 87 Wis. 400.

and not remote. For instance, the restraining of local municipal taxation is not of such public importance in this sense as to set in motion the original jurisdiction of the court. A proper case for the exercise of its original jurisdiction in the granting of injunctions by the supreme court is where purprestures or public nuisances are sought to be enjoined or abated. Obstructions to navigable rivers within the limits of the state are matters which directly concern the sovereign prerogative, and justify the exercise of the prerogative jurisdiction of the supreme court under the constitution to enjoin such obstructions.¹ But the supreme court will not exercise its appellate jurisdiction in a case still pending in a lower court.² Nor will a restraining order from the supreme court issue, where the party seeking it may obtain relief by other adequate remedy in the lower court.³ But it has been held that the granting by the supreme court of a temporary order of injunction pending an appeal to the supreme court, is not an unconstitutional attempt on the part of that court to assume jurisdiction. If such injunction appears necessary to render effectual the judgment entered below, it is a part of the appellate jurisdiction of the court to grant it.⁴

Where the circuit courts of a state have under their organization no general chancery jurisdiction, and their equity powers are specified and limited, not including the power to grant injunctions, a statute conferring such power upon a circuit judge does not authorize the court as such to grant injunctions, a distinction being taken in that regard between the court and the judge.⁵ But it was held that, in the absence of the regular judge, empowered to hold a circuit court of the United States, another justice of the supreme court not assigned to that circuit had juris-

¹ *Attorney-General v. City of Eau Claire*, 37 Wis. 400; *State v. City of Eau Claire*, 40 Wis. 533. But the supreme court has no jurisdiction of injunction to restrain a person from exercising the duty of county attorney. *Foster v. Moore*, 32 Kan. 488.

² *Cooper v. City of Mineral Point*, 34 Wis. 181. The supreme court cannot enjoin a railroad company's occupation of a right of way pending the amendment of the return to a writ of *certiorari*, in condemnation proceedings in the probate court, as its jurisdiction in equity causes is exclusively appellate. *Traverse City, K. & G. R. Co. v. Seymour*, (Mich.) 45 N. W. 826.

³ *State v. Judge Ninth Judicial Dist.*, 39 La. An. 1108; 3 So. 342.

⁴ *Wagner v. Railway Co.*, 38 Ohio St. 32.

⁵ *Cummings v. Des Moines, W. & S. W. R. Co.*, 36 Iowa, 173.

diction to hear a motion for a preliminary injunction and to grant it.¹

A statute enacting that in all cases of breach of contract the plaintiff in an action may pray and have an injunction against a repetition or continuance of the breach of contract is construed not to confer general chancery powers upon a court of law, but as limiting the power of that court to granting the remedy by injunction, and without authorizing it to grant other equitable relief.² And when a court of equity exceeds its jurisdiction in awarding an injunction, a writ of prohibition will lie to prevent further proceedings therein by such court.³ But under a statute authorizing every judge of a county court to award injunctions whether the judgment or proceeding enjoined be of a superior or inferior court of his county or district, a judge of a county court may award an injunction on a bill addressed to the judge of the circuit court; nor does the fact that the bill was afterwards filed in the circuit court affect the validity of the injunction.⁴

§ 7. *Conflict of Jurisdiction.* — The line separating legal tribunals from those of equitable jurisdiction should not be exceeded. Unless special circumstances warrant interference, the extraordinary aid of courts of equity should not be extended, for the protection of purely legal rights properly triable at law.⁵ Where a right is asserted whose existence or non-existence is properly triable at law, and the exercise of which can do no injury to the party denying its existence, no ground is afforded for equitable interference.⁶

The refusal of one court of co-ordinate jurisdiction to grant an injunction, constitutes no bar to the granting of such relief by

¹ *United States v. Louisville & P. C. Co.*, 4 Dill. 601. Territorial courts from which writs of error and appeals to the Supreme Court of the United States are allowed and taken, "in the same manner and under the same regulations as from the circuit courts of the United States," can grant an injunction in favor of plaintiff, pending an appeal taken by him from such court to the Supreme Court of the United States. *Bullion Beck, etc. Min. Co. v. Eureka Hill Min. Co.*, (Utah) 12 P. 660.

² *Richmond v. Dubuque & S. C. R. Co.*, 33 Iowa, 422.

³ *Swinburn v. Smith*, 15 West Va. 483.

⁴ *Rosenberger v. Bowen*, 84 Va. 675; 5 S. E. 697.

⁵ *Wooden v. Wooden*, 2 Green Ch. 429. "However irreparable the injury to parties may be, this court has no power or right to prevent it, if it be sanctioned by law." *Sparrow v. The Oxford, Worcester, & Wolverhampton Railway Co.*, 9 Hare, 441.

⁶ *Doughty v. Somerville & E. R. Co.*, 3 Halst. Ch. 51.

another. It is merely a question of courtesy whether another court of co-ordinate jurisdiction and equal powers shall grant or deny the relief. If the court to which application is subsequently made grants an injunction, it is not within the power of the first court afterwards to vacate the injunction, except upon a regular hearing of a motion to dissolve.¹ Still, if one of two courts of co-ordinate jurisdiction and powers has obtained jurisdiction of a cause, it should retain it until finally disposed of, though both courts may have authority to grant injunctions; and if one tribunal properly having cognizance of the case has exercised its jurisdiction the other should refuse to interfere.²

An injunction will not be granted upon a new suit instituted for the sole purpose of obtaining it, to be merely auxiliary to an action already begun, where the object desired can be as readily attained by a motion in the original action, since the exercise of the jurisdiction under such circumstances would encourage vexatious litigation.³

§ 8. **Territorial Limits of Jurisdiction.** — Jurisdiction to grant injunctions extends only to persons within the territorial jurisdiction of the court. Persons and property beyond the borders of the state in which the proceedings are instituted are not bound by the judgment; nor does the law of comity between the different state governments recognize the authority of one state to exercise jurisdiction over citizens and property within the boun-

¹ Welch v. Byrns, 38 Ill. 20.

² Winn v. Albert, 2 Md. Ch. 42; Birmingham Railway & Electric Co. v. Birmingham Traction Co., (Ala.) 25 So. 777. A judge of the court of common pleas is without power to grant an *ex parte* injunction order in an action pending in the superior court. People v. Edson, 52 N. Y. Superior Ct. 53. A bill in equity will not lie merely to obtain an injunction and receiver, pending another suit covering all rights in the disputed property; interference with such rights can be restrained by some proceeding in the suit pending. Beekman v. Fletcher, 48 Mich. 156. The civil district court for the parish of Orleans has no authority to enjoin the sheriff of the criminal district court for the same parish from executing a *fi. fa.* issued on a money judgment rendered by the latter court in a criminal prosecution against a surety on a forfeited appearance bond. Arthurs v. Villeré, (La.) 9 So. 126.

³ Hamer v. Kane, 7 Nev. 61. Where a *mandamus* from the Supreme Court was directed to the sheriff, and subsequently an injunction inconsistent therewith was issued by the circuit court, *held*, the sheriff was not in contempt for disregarding the latter. Watson, C. J., dissenting, on the ground that the appellate jurisdiction of the Supreme Court did not extend to issuing final process. State v. Jacobs, 11 Or. 314; 8 P. 332.

daries of another.¹ But a court of equity may enjoin one from prosecuting a suit² or selling property³ in another state, if justice so requires. Courts will not, however, enjoin the prosecution in another state of an action between its own citizens merely because the rule in such other state as to evidence of transactions between them differs from that in their own state.⁴ A non-resident defendant not served with process and who is not subject to the jurisdiction of the court cannot be enjoined from performing an act beyond the state, even though there has been constructive service by publication as to such defendant.⁵ And while a court having jurisdiction of a defendant may, no doubt, enjoin him from wasting or interfering with property, or asserting title thereto, though the property be situated in a foreign country, it will not grant an injunction asked for on the sole ground

¹ *Western Union T. Co. v. Pacific & A. T. Co.*, 49 Ill. 90. Suit was instituted by a domestic corporation against two others, one domestic, and the other foreign, but having an office and agency and doing business in the state of New York. An accounting was prayed for under an alleged existing contract between the foreign corporation and plaintiff, and also an injunction to restrain the former from an alleged unlawful interference with certain of plaintiff's rights under said contract, said interference consisting in part of acts which could only be done in another state, such as seizing plaintiff's telegraph poles, etc., and in part of a combination between defendants which was to be consummated in said state of New York, the same having for its object the taking away of plaintiff's said rights and conferring them upon another, etc. It was *held*, 1. That the New York courts had no jurisdiction to enjoin the doings of the threatened acts in another state, nor to compel the undoing of the same, if done; 2. That they had jurisdiction to the extent of compelling an accounting, and of restraining the doings of the acts threatened to be done in New York. *Atlantic & Pacific Telegraph Co. v. Baltimore & Ohio R. R. Co.*, 46 N. Y. Super. Ct. 377. As to jurisdiction in other counties of the same state see *Graham v. Commissioners of Harford County*, 39 A. (Md.) 804; *Delaware County & P. Electric Ry. Co. v. City of Philadelphia*, 30 A. 396; 164 Pa. St. 457.

² *Pickett v. Ferguson*, 45 Ark. 177; s. c. 55 Am. Rep. 545.

³ *Prager v. Micas*, 36 La. An. 75.

⁴ *Edgell v. Clarke*, (Sup.) 45 N. Y. S. 979; 19 App. Div. 199. See also *Hawkins v. Ireland*, 64 Minn. 339.

⁵ *Hazlehurst v. Savannah, G. & N. A. R. Co.*, 43 Ga. 13. A judgment was obtained in Wisconsin against an insurance company. Suits were instituted in Illinois against the judgment creditors, and the money was garnished in the hands of the company. Other persons claimed it by assignment. The company instituted proceedings in another county in Wisconsin to enjoin collection until the right to the money could be determined. *Held*, that injunction would not lie against a proceeding in the foreign tribunal, or in the court of the county where the judgment was taken, it being of coordinate jurisdiction. *Orient Ins. Co. v. Sloan*, 70 Wis. 611; 36 N. W. 388.

that certain acts of the officials of a foreign government, creating defendant's title to the property, are void.¹

§ 9. **Statutory Regulations of Jurisdiction.** — A liberal discretion is given by statutes to the judges of the courts both of England and most of the states, and their discretion in the administration of relief by injunction has been, from time to time, considerably enlarged.² In the very nature of things such

¹ *Marshall v. Turnbull*, 34 F. 827.

² By the English Judicature Act, 1873, subd. 8 of sec. 25, it is provided that: "A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made; and any such order may be made either conditional or upon such terms and conditions as the court shall think just; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any color of title; and whether the estates claimed by both or by either of the parties are legal or equitable." This statute is construed to confer upon the courts unlimited power to grant injunctions in all cases in which it would be right and just to do so. But it is held that what is right and just must be determined, not by the caprice of the judge, but according to established legal principles, precedents, and reasons. *Beddow v. Beddow*, 9 Ch. D. 89; *Day v. Brownrigg*, 10 Ch. D. 294. Cal. Code of Civil Procedure, sec. 526, subd. 1, allows an injunction to be granted in the following cases: When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually. Though a right of way for a toll-road is a mere incorporeal hereditament, yet a complaint which shows that plaintiff is the owner of the right of way for a toll-road, and entitled to collect tolls thereon, and that defendant county interferes with his enjoyment of his property by depriving him of his tolls, presents a sufficient case for an injunction, under Code Civil Proc. Cal. 731, which provides that anything which is an obstruction to the free use of property may be enjoined. *Welch v. Plumas County*, 80 Cal. 338; 22 P. 254. A similar provision is found in the statutes of several other states. The new Pa. Constitution does not affect the jurisdiction of the courts of common pleas in matters of injunction. *McGeorge v. Hancock Steel, etc. Co.*, 11 Phila. (Pa.) 602. Under 2 Comp. Laws, Utah, 1888, § 3300, providing that an injunction may be granted when it appears by the complaint that plaintiff is entitled to the relief demanded, which consists in restraining the "commission or continuance" of the act complained of, the court may grant a mandatory, as well as a preventive, writ to a street-railroad company against a defendant who has piled obstructions on its road-bed. *Henderson v. Ogden City Ry. Co.*, (Utah) 26 P. 286. A court on which is conferred general authority to issue writs of injunction, and to issue all writs necessary to enforce the jurisdiction,

§ 11. **Generally preventive — rarely mandatory.** — Formerly the writ was often used to compel as well as to restrain action, but owing to the growth and extension of jurisdiction of courts of equity to administer relief by decreeing specific performance, and of courts of law by mandamus, injunction is at the present day confined in practice to its uses as a preventive remedy, and is seldom used by courts in the exercise of a mandatory function. It is not used for the purposes of punishment or to compel persons to do right, but simply to prevent them from doing wrong.¹ Indeed it may be said that the use of the writ is confined to cases of a threatened actual wrong to the person or property of the person seeking it, and will not be granted to prevent mere abstract injury unconnected with actual damage or detriment.² Still it must not be supposed that the mandatory function of the writ has become obsolete from non-usage. It is still resorted to upon special occasions demanding it, as the only means of attaining substantial justice. The jurisdiction by mandatory injunction is firmly established, and, though rarely exercised, its existence cannot be questioned.³ The mandatory injunction may issue from the United States circuit court sitting in equity in a proper case, wherever it might issue under the general chancery practice.⁴

¹ *Attorney-General v. New Jersey R. R. & T. Co.*, 2 Green Ch. 136; *Washington University v. Green*, 1 Md. Ch. 97; *Sherman v. Clark*, 4 Nev. 138; *Blakemore v. Glamorganshire, etc.*, 1 Myl. & K. 154. Injunction and mandamus are rarely appropriate remedies in the same case. *Whigham v. Davis*, (Ga.) 18 S. E. 548.

² *Goodrich v. Moore*, 2 Minn. 61.

³ *Garretson v. Cole*, 1 Har. & J. 370; *Henderson County Board v. Ward*, (Ky.) 54 S. W. 725; *City of Toledo v. Northwestern Ohio Nat. Gas Co.*, 6 Ohio N. P. 531; *Hunt v. Sain*, 181 Ill. 372; 54 N. E. 970; *Glover v. Swartz*, 8 Okl. 642; 58 P. 943; *Corning v. Troy Factory*, 40 N. Y. 191; *Foot v. Bronson*, 4 Lans. 47; *Durell v. Pritchard*, L. R. 1 Ch. 244; *Ex parte Lennon*, 17 S. Ct. 658; 166 U. S. 548; 41 L. Ed. 1110; *Warlier v. Williams*, (Neb.) 73 N. W. 539; *Newlin v. Prevo*, 81 Ill. App. 75; *Calhoun v. McCornack*, (Okl.) 54 P. 493. Complainant railroad company, having no connection by rail with defendant's stockyards, secured the services of a connecting road in transferring stock shipped over its road. The price of such service being raised, complainant began transferring by means of floats, but defendants refused to receive stock so transferred, or to permit the floats to land at their wharves. On application for a preliminary mandatory injunction to defendants to receive its freight, *held*, that the facts showed no such pressing necessity as to require such writ. *Delaware L. & W. R. Co. v. Central Stock-Yard & Transit Co.*, 43 N. J. Eq. 605; 12 A. 374.

⁴ *Norfolk Trust Co. v. Marye*, 25 Fed. Rep. 654; Com. Dig. *Chancery*,

§ 12. **Injury threatened must be actual and impending.** — Acts which can have no injurious result, though irregular and unauthorized, constitute no ground for relief by injunction; the injury being inflicted or threatened must appear to the satisfaction of the court, to be substantial and positive.¹ And where an injunction is sought to stay the progress of a public work, it will not be allowed unless the act threatened to be done will cause irreparable injury to the complainant.² But it is not essential to the granting of equitable relief, that irreparable injury should have already resulted from the acts complained of. It is only required that the damage is threatened or impending, and that a clear necessity be shown for affording immediate protection to some right or interest which would otherwise be seriously injured or impaired.³ Courts of equity may interpose by injunc-

D. 11, 13; Gilb. Forum Roman. ch. 11, pp. 192, 194. The jurisdiction of a court to grant a preliminary injunction against the diversion of the water of a stream, includes the power to direct the removal of the means by which the diversion is made. *Johnson v. Tulare County Superior Court*, 65 Cal. 567.

¹ *Rogers v. Michigan, S. & N. I. R. Co.*, 28 Barb. 539; *Head v. James*, 13 Wis. 641; *Bank of California v. Fresno C. & I. Co.*, 53 Cal. 201; *Nelms v. Pinson*, (Ga.) 17 S. E. 350; *Beck v. Flournoy Live-Stock & Real-Estate Co.*, (C. C. A.) 65 F. 30; 12 C. C. A. 497; *New York Cent. & H. R. Co. v. Haffen*, (Sup.) 35 N. Y. S. 806, 90 Hun, 260. A mere threat to tear down a wharf, without any overt act evincing a purpose to execute it, is not sufficient to warrant an injunction, unless the insolvency of the defendant is shown. *Bond v. Wool*, 107 N. C. 139; 12 S. E. 281. An assignee in bankruptcy cannot maintain an action to enjoin the bankrupt from using a seat in the stock exchange, it not appearing that the bankrupt is doing, or is likely to do, anything which will impair such rights as the assignee has. *Platt v. Jones*, 49 N. Y. Super. Ct. 279.

² *Booream v. North Hudson County Ry. Co.*, 40 N. J. Eq. 557. In Idaho it is provided by statute that an injunction may be granted (1) when the complaint shows that plaintiff is entitled to the relief demanded, which consists in restraining the commission or continuance of the act complained of; (2) when the commission or continuance of some act during the litigation would produce waste or great or irreparable injury to the plaintiff; and (3) when the defendant is doing some act in violation of the plaintiff's rights, having a tendency to render the judgment ineffectual. *Held*, that injunction would lie to restrain continuance of the unlawful removal of ore from plaintiff's mine, whether or not the injury, if consummated, would be irreparable. *Gilpin v. Sierra Nev. Min. Co.*, (Idaho) 23 P. 547; Rev. St. Idaho, sec. 4288.

³ *Crisman v. Heiderer*, 5 Col. 589. Plaintiff, a member of a musical union, whose void by-laws prohibited any member from employing a non-member, or playing in an orchestra with one not a member, engaged a person not eligible to membership to play in an orchestra which he was conducting. The union sued plaintiff to enforce its by-laws. These proceedings threatened to disperse the orchestra, which had been gotten together by the skill and industry of

tion where public officers are proceeding illegally to injure private property, but not where an order has been passed and no threat made or act done to carry it out.¹

If the party securing the relief has no title to or interest in the property, and no claim to the ultimate relief sought in the litigation, an injunction will not be granted.² It is also an undeviating rule that the illegality of the threatened act or proceeding must be clear and not debatable.³ The general principle is thus broadly stated: A party seeking this remedy must show not only clear legal or equitable rights, but a well-grounded apprehension of immediate injury to such rights.

§ 13. **And irreparable at Law.** — Where no necessity is shown for the injunction as a means of protection to a party's rights, it should not be granted.⁴ It has been truly said: "An injunc-

plaintiff; two of its members actually leaving. *Held*, that, as irreparable injury was threatened, an injunction would be granted against further proceedings. Daniels, J., dissenting. *Thomas v. Musical Mutual Protective Union*, 2 N. Y. S. 195. Where one agent of a mining company had been removed, and another appointed in his stead, and the evidence showed a well-grounded fear that force would be used to wrest the possession from the latter, a temporary injunction was held properly granted. *Flagstaff Silver Mining Co. v. Patrick*, 2 Utah, 304. A bill to enforce a lien and for an injunction, which shows, however imperfectly, that complainant has had turned out to him a quantity of No. 1 iron ore, and that an assignee of the debtor has possession of it, and is mixing it with ore of another quality and shipping it, makes out an equitable case to which a general demurrer will not lie. A party in such a case cannot be turned over to a suit at law to recover damages from the wrongdoer, even though he may be insolvent. *Ib.*; *Glidden v. Norvell*, 44 Mich. 202.

¹ *Weiss v. Jackson County*, 9 Or. 470.

² *State v. McGlynn*, 20 Cal. 288. *O'Brien v. O'Connell*, 7 Hun, 228. A taxpayer cannot maintain a bill for an injunction against the violation by an academy of a contract with the school district, in a matter not affecting plaintiff's interest. *Page v. Haverhill Academy*, 63 N. H. 216. A judgment creditor of A. brought suit to annul a sale of movables alleged to have been fraudulent, and asked for an injunction to restrain the vendee from disposing of the same *pendente lite*. *Held*, that, as the petitioner showed neither a right of property in the movables, nor that their sale by the vendee would give the petitioner a right to damages, an injunction should not be granted. *McAdam v. Rainey*, 33 La. An. 108.

³ *Roake v. American Telephone, etc. Co.*, 41 N. J. Eq. 35; *Cooper v. Passenger R. Co.*, 3 Phila. (Pa.) 262; *Windrim v. Philadelphia*, 8 Phila. (Pa.) 361; *Kelly v. Long*, 7 Phila. (Pa.) 455; *Wetham v. Clyde*, 1 Leg. Gaz. (Pa.) 53; *Johnson v. Kier*, 3 Pitts. (Pa.) 204; *Germantown Water Co. v. McCallum*, 5 Phila. (Pa.) 93; *McDonald v. Bromley*, 6 Phila. (Pa.) 302; *Volmer v. Greer*, 7 Phila. (Pa.) 453.

⁴ *Crawford v. Bradford*, 28 Fla. 404; 2 So. 782. A threatened sale of land on execution under a judgment for deficiency rendered in foreclosure pro-

tion will not be granted unless the anticipated injury is not reparable by recovery of damages in an action at law, whether from need of numerous or successive suits, or from insolvency of defendants, or from derangement of business.”¹ It is a valid objection in all cases of applications for relief by injunction, that the party aggrieved has a full and adequate remedy at law. It is a well established rule that courts of equity will not lend their aid for the protection of rights and the prevention of wrongs where the ordinary legal tribunals are capable of affording sufficient legal redress.² And where it does not appear that

ceedings will not be enjoined because the court had not acquired jurisdiction of the mortgagor's person by service of process. The judgment being void, a sale thereunder is without any authority whatever, and cannot work irreparable injury to the mortgagor. *Gillam v. Arnold*, (S. C.) 11 S. E. 831.

¹ *Haskell v. Thurston*, 80 Me. 129; 13 A. 273. Where a debtor transfers goods, partly purchased on credit, in payment of a mortgage, and the creditors seek to have the vendee restrained from interfering with the goods, and to have a receiver appointed, but allege no fraud in the procurement of the goods from them, claim no lien, nor seek to have the sale by them set aside, and it does not appear that the vendee is insolvent, the relief is properly refused. *Dereny v. Hicks*, 82 Ga. 240; 8 S. E. 179. But where a municipal corporation, having extended its limits, is about to appropriate private property for street purposes without payment of compensation in advance, as required by statute and a constitutional provision, an injunction will be granted to prevent it, there being no adequate remedy at law. *Appeal of Borough of Carwensville*, 129 Pa. St. 74; 18 A. 561.

² *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372; *Coughron v. Swift*, 18 Ill. 414; *Akrill v. Selden*, 1 Barb. 316; *Sherman v. Clark*, 4 Nev. 138; *Richards v. Kirkpatrick*, 53 Cal. 433; *Winkler v. Winkler*, 40 Ill. 179; *Poage v. Bell*, 3 Rand. 586; *Frazier v. White*, 49 Md. 1; *City of Council Bluffs v. Stewart*, 51 Iowa, 385; *Whalen v. Dalashmutt*, 59 Md. 250; *Hayes v. Hayes*, 2 Del. Ch. 191; *Olmsted's App.*, 86 Pa. St. 284; *Hewett v. Kuhl*, 10 C. E. Green, (N. J.) 24; *Carr v. Lee*, 44 Ga. 376; *Morgan v. Board of Com'rs of Kootenai County, (Idaho)* 89 P. 1118; *Yates v. Batavia*, 79 Ill. 500; *Smith v. Short*, 11 Iowa, 523; *People v. Wasson*, 64 N. Y. 167; *Wilson v. Hughell, Mor. (Iowa)* 461; *Snyder v. Marks*, 109 U. S. 189; *Legg v. Horn*, 45 Conn. 409; *Grant v. Moore*, 88 N. Car. 77; *Finegan v. Fernandina*, 18 Fla. 127; *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315; *Sheldon v. Motter*, (Kan.) 53 P. 89; *Eidenmiller Ice Co. v. Guthrie*, (Neb.) 60 N. W. 717, 42 Neb. 238; *State v. Civil District Judge*, 34 La. An. 741; *Gore v. Brubaker*, 55 Md. 87; *Jacks v. Bigham*, 36 Ark. 481; *Jersey City v. Gardner*, 33 N. J. Eq. 622; *Gutierrez v. Pino*, 1 New Mexico, 392; *Frazier v. White*, 49 Md. 1; *Edwards v. Allouez Min. Co.*, 38 Mich. 46; *Mayo v. Brytle*, 47 Cal. 626; *Hausmeister v. Porter*, 21 Fed. Rep. 355; *Torpedo Co. v. Clevedon*, 19 Fed. Rep. 231; *Lutcher v. Norsworthy*, (Tex. Civ. App.) 27 S. W. 630; *Indianapolis Nat. Gas Co. v. Kibby*, 135 Ind. 357; *Welton v. Dickson*, 38 Neb. 767; *Sylvester v. Jerome*, 19 Colo. 128; *Allen v. Dunlap*, 24 Or. 229; *Chicago Public Stock Exchange v. McClaughry*, 36 N. E. 88; 148 Ill. 372 (50 Ill. App. 358, affirmed); *Whittlesey*

the remedy at law is inadequate, or that the party aggrieved is entitled to more speedy relief than that which can be obtained by the ordinary process of courts of law, an injunction will be

v. Hartford, etc. R. Co., 23 Conn. 421; *Arnold v. Klepper*, 24 Mo. 273; *Winnipiseogee Lake Co. v. Worster*, 29 N. H. (9 Fost.) 433; *Palmer v. Logansport, etc. Co.*, 108 Ind. 137; *Kenny v. Consumers' Gas Co.*, 142 Mass. 417; *Goldfrank v. Young*, 64 Tex. 462; *Wilkins v. Hogue*, 2 Jones (N. Car.) Eq. 479; *McCoy v. U. S. Bank*, 5 Ohio, 548; *Nicolson v. Hancock*, 4 Hen. & M. (Va.) 491; *Kilpatrick v. Smith*, 77 Va. 347; *Kendall v. Missisquoi, etc. R. Co.*, 55 Vt. 438; *Hulse v. Wright, Wright (Ohio)*, 61; *Lanahan v. Gahan*, 87 Md. 105; *Bay City Bridge Co. v. Van Etten*, 86 Mich. 210; *Hagner v. Heyberger*, 7 W. & S. Pa. 104. For an interruption of light, air, and access to property, caused by building a stairway in front of plaintiff's property by an elevated railroad company, to enable passengers to ascend to its road, plaintiff has a sufficient remedy at law, and an injunction will not issue. *Krone v. Kings County El. R. Co.*, 50 Hun, 431; 8 N. Y. S. 149. It is not within the jurisdiction of a court of equity to restrain, by injunction, representations or publications by a mercantile agency, as to the character and standing of the plaintiff or as to his property, although such representations may be false, if there is no breach of trust or of contract involved. The vindication of the plaintiff's alleged rights is properly the subject of an action at law. *Raymond v. Russell*, 143 Mass. 295; 9 N. E. 544. Where plaintiff has an ample remedy by garnishment proceedings, which he has already instituted in the district court against the defendant who has fraudulently and collusively attached the property of plaintiff's debtor, he is not entitled, for his further protection, to a temporary injunction either in the district or supreme court to restrain defendant from disposing of the goods so attached. *Van Natta-Lynds Drug Co. v. Gerson*, 43 Kan. 660; 23 P. 1071. Forcible entry and detainer is the proper remedy for a trespass on lands by entry, under a claim of title, for the purpose of plowing; and injunction will not lie to prevent the trespass. *Davis v. Hinton*, 29 Ill. App. 327. A. bought for speculation certain bottom lands upon which large quantities of sand were continually deposited by a stream that operated a stamp mill higher up, and then, putting a valuation upon the same of from three to five times what it cost him, tried unsuccessfully to sell it to the corporation owning the mill. He then prayed for an injunction to restrain the corporation from running or depositing its stamp sand on the land, and from polluting the stream. *Held*, that equity would not interfere, and that A. was entitled to such remedy as the law might give him, and no more. *Campbell, C. J.*, dissenting. *Edwards v. Allouez Mining Co.*, 38 Mich. 46. An action of claim and delivery, in which the sheriff has taken and holds the property, is an adequate remedy against a constable's threatened sale thereof, and an injunction will not be granted. *Richards v. Kirkpatrick*, 53 Cal. 433. For further illustrations of the rule: *Shaw v. Chambers*, 48 Mich. 355; *Eaton v. Trowbridge*, 38 Mich. 454. As to when and under what circumstances court will interfere with proceedings in ejectment by injunction. *Kirkpatrick v. Smith*, 77 Va. 347; *Appeal of Hoch*, 133 Pa. St. 328; 19 A. 360. Cases involving title to office. *Francisco v. Flinn*, 118 U. S. 385; *Karrer v. Berry*, 44 Mich. 391; *Towne v. Bowers*, 81 Mo. 491; *Bullitt v. Songster*, 3 Munf. (Va.) 55.

refused.¹ Accordingly where complainant's equity is based upon a claim for unliquidated damages for a substantive injury for which ample remedy exists at law, and there is no impediment to bringing the action in a legal forum, the injunction will be refused.² And where a positive statutory remedy exists for the redress of particular grievances, equity will not assume jurisdiction of the questions involved. Nor will such courts enjoin such proceedings to enforce such statutory remedy. Such interference would place the judicial above the legislative power.³

In its general sense an irreparable injury is one which cannot be repaired by any means accessible to individual parties or by invoking the aid of others. In its technical sense, as used in connection with the question of granting or withholding preventive equitable aid, we mean by saying that an injury is irreparable either that no legal remedy furnishes full compensation or adequate redress, owing to the inherent ineffectiveness of such legal remedy, or that, owing to the delay incident to the prosecution of an action at law to final judgment and obtaining service thereon, such judgment and process would prove fruitless of beneficial results. However it may have been at a former period, it is not entirely correct to say at present, that an injunction will never be granted except in cases of irreparable threatened injury as a consequence of withholding it. "By the term 'irreparable injury' it is not meant that there must be no physical possibility of repairing the injury; all that is meant is that the injury be a serious one, or at least a material one, and not adequately reparable by damages at law; and by the term 'the inadequacy of the remedy by damages,' is meant that the damages obtainable at law are not such a compensation as will, in effect, though not *in specie*, place the parties in the position in which they formerly stood. The fact that the amount of damage cannot be accurately ascertained may constitute irreparable damage. It is no objec-

¹ Mullen v. Jennings, 1 Stockt. 192; Hart v. Marshall, 4 Minn. 294.

² Webster v. Couch, 6 Rand. 519. So it was held that a court of equity will not interfere by injunction in aid of the right of stoppage *in transitu*, but will leave the parties to their legal remedies. Goodhart v. Lowe, 2 Jac. & W. 349. The same ruling was made when it appeared on the face of the bill that a court of equity had no jurisdiction of the subject-matter of the cause, and that the party aggrieved had an adequate remedy at law. Winkler v. Winkler, 40 Ill. 179.

³ Brown's Appeal, 66 Pa. St. 155; Hornesby v. Burdell, 9 S. C. 303.

tion to the exercise of jurisdiction by injunction that a man may have a legal remedy. The question in all cases is whether the remedy at law is, under the circumstances of the case, full and complete.”¹

§ 14. **Same Subject continued.** — Where the legal right depends upon the construction of recorded instruments, an injunction will not be granted to restrain a sale of land of which plaintiff is in possession, courts of law being as well qualified to give a proper construction to written instruments as courts of equity.² An injunction lies to prevent threatened trespasses, though the damages be susceptible of compensation, where otherwise there is a probability of the wrong being often repeated and plaintiff thereby involved in a multiplicity of suits. In such case the legal remedies are inadequate to specifically meet the needs of plaintiff's case.³ As a rule, an action at law affords adequate remedy in damages for breaches of contract. Therefore an injunction is not granted in such cases unless, from the nature of the case or attending circumstances, there appears no means of approximately measuring the damages resulting from a breach.⁴ On the same principle and

¹ 1 Joyce Inj. 75. The insolvency of a party against whom injunction is sought does not alone constitute ground for the relief. *Strang v. Richmond, P. & C. R. Co.*, 93 F. 71.

² *Browning v. Lavender*, 104 N. C. 69; 10 S. E. 77.

³ *Wilson v. Hill*, (N. J.) 19 A. 1097. Where a party claiming to act as a road commissioner had removed complainant's fences a considerable number of times, under a claim that they were obstructions to a public road, and was threatening to remove them as often as replaced, and he had no property subject to execution, and the proofs failed to show that the road was in fact located over the place in dispute, it was held that the court had jurisdiction to enjoin the defendant from again removing such fences. The reason assigned for so holding was that there was no adequate remedy at law, and that an injunction would prevent a multiplicity of suits. *Owens v. Crossett*, 105 Ill. 354. But an injunction against the occasional moving of a building in such a manner as to obstruct, temporarily, the running of a line of street cars should not be granted. The injury is not irreparable, and the law affords an adequate remedy by way of damages. *Fort Clarke Horse Ry. Co. v. Anderson*, 108 Ill. 64; s. c. 48 Am. Rep. 545.

⁴ *Bronk v. Riley*, 50 Hun, 489; 3 N. Y. S. 446. In Missouri it is not essential that the injury threatened shall be irreparable to warrant a resort to an injunction, nor that defendant should in all cases be insolvent. It is sufficient if an adequate remedy cannot be afforded by an action for damages. Following *Harris v. Township Board*, 22 Mo. App. 465; *Sedalia Brewing Co. v. Sedalia Water-Works Co.*, 34 Mo. App. 49. A tenant leasing on shares, he to furnish the labor and the landlord the team, cannot enjoin the landlord from taking possession of the entire crop on the ground that he failed to furnish

for the same reason a court should not grant an injunction for the protection of a naked legal right which complainant and those under whom he claims have covenanted not to exercise.¹ Nor should the question of title to office be settled upon an application for an injunction. *Quo warranto* affords the proper remedy.²

the team, as the remedy at law for the violation of the contract is ample. *Nicholson v. Cook*, 76 Ga. 24. The breach of a contract by which defendant agreed to have her whole crop of sugar for two years refined at plaintiff's refinery may be adequately compensated by damages at law, and equity will not enjoin a violation of the agreement. *Burdon Cent. Sugar Ref. Co. v. Leverich*, 37 F. 67. The basis of a complaint for an injunction against a town by a gas company being that the village is using more gas than it is entitled to under the contract, the plaintiff has an adequate remedy at law, and equity has no jurisdiction to enjoin the use of open lights. *Saltsburg Gas Co. v. Borough of Saltsburg*, (Pa.) 20 A. 844. In an action to restrain lessees from removing from the demised premises certain articles, as in violation of provisions of their leases, it appeared that such articles were not fixtures, but personal chattels, easily removed without injury to the buildings, and that their exact money value could be readily determined. *Held*, that there was no such injury to the freehold, or other irreparable injury, as to require the interference of equity. *Loeser v. Liebmann*, 60 Hun, 579; 14 N. Y. S. 569. S. contracted with a gas-light company, in consideration of a reduced price for gas, not to use electric or other material or power for general illuminating purposes on his premises, the quantity of gas consumed not to fall below a certain amount. In an action by the company to restrain S. from using electric lights, the petition alleged that the introduction of such lights upon said premises largely reduced the amount of gas used below the amount stipulated, whereby "the company will lose the benefit of said contract, and the gain and profit it is entitled to therefrom, and will suffer irreparable damage." *Held*, that the petition did not show that the company might not have full, adequate relief in damages by a suit at law, and that plaintiff was therefore not entitled to an injunction. *Steinau v. Cincinnati Gas-Light & Coke Co.*, (Ohio) 27 N. E. 545. Equity will not enjoin the sale of property which has been scheduled, thereby suspending a sale of the same, where the execution debtor has given a delivery bond, because the owner may have an adequate remedy at law for all injury done him by the sale. *Jacks v. Bigham*, 36 Ark. 48.

¹ *Bosley v. McKim*, 7 Har. & J. 468.

² *Kilpatrick v. Smith*, 77 Va. 347. Same rule in federal courts. *White v. Berry*, 18 S. Ct. 917; 171 U. S. 336. The question whether or not a town is legally incorporated cannot be raised by bill to enjoin the tax collector of the town from selling complainant's property for taxes levied by said town, complainant's remedy being by *quo warranto*. *Bateman v. Florida Commercial Co.*, 26 Fla. 423; 8 So. 51. For the same reason a court of chancery will not enjoin the commissioners of a drainage district from exercising jurisdiction over certain land on the ground that such land has not been legally annexed to the district, the landowner having an adequate remedy at law by *quo warranto*. *Bodman v. Drainage Com'rs*, 132 Ill. 439; 24 N. E. 630. An injunction sought by a certain member of a corporation chartered for benevolent purposes against certain other members who were officers *de facto*, and who were proceeding to

The same rule applies where the proper form of relief is mandamus.¹ And where a party seeking an injunction to restrain an obstruction of a street named in his complaint a fixed sum as the amount of damage to his business thereby occasioned, such complaint was held to show on its face an adequate remedy at law, although he afterward alleged that his business would be entirely destroyed by reason of such obstruction.²

§ 15. **Writ not granted where Grievance available as Defence at Law.** — Equity will not interfere by injunction to restrain proceedings at law when all the matters of defence are as available at law as in equity, although complicated and more difficult of presentation.³ There is no ground for issuing a restraining order where the act threatened is only the infliction of a pecuniary fine, which, against plaintiff's will, could only be collected, if at all, by an action at law, wherein he might set up as a defence the facts stated in his complaint.⁴ On the same principle it was held that the fact that city bonds were sold and delivered before the ordinance providing for issuing them took effect, was no ground for enjoining their payment at the suit of a taxpayer.⁵ But the general rule was held not to apply where a petitioner having a meritorious defence would be estopped from setting it up at law.⁶

If the matter constituting the ground for the application for injunction is available by way of set-off or counter-claim, relief should be denied.⁷

enforce the discipline provided by the by-laws against the complainants, refused. If such officers were illegally elected, the proper remedy was by *quo warranto*. *Hussey v. Gallagher*, 61 Ga. 86.

¹ *N. Y., etc. Ry. Co. v. Inhabitants of Montclair*, 47 N. J. E. 591; 21 A. 493.

² *Gardner v. Stroeve*, 81 Cal. 148; 22 P. 483.

³ *Pullman Palace Car Co. v. Central Transp. Co.*, 34 F. 357; *Columbia Building & Loan Ass'n v. Grange*, (C. C.) 77 F. 798. Plaintiff engaged defendants to construct a macadam road on a public county road, reserving the right to cancel the contract if, for any reason, the work done under it did not satisfy him. *Held*, that plaintiff, having notified defendants to discontinue work because of non-compliance with the contract, could not have an injunction against the further prosecution of the work by defendants, there being an adequate remedy at law. *Shepherd v. Groff*, 34 W. Va. 123; 11 S. E. 997.

⁴ *Thomas v. Musical, etc. Protec. Union*, 121 N. Y. 45; 24 N. E. 24.

⁵ *Thomson-Houston Electric Co. v. City of Newton*, 42 F. 723.

⁶ *Penn v. Ingles*, 82 Va. 65.

⁷ *Dewey v. Billings*, 76 Mich. 89; 42 N. W. 1077.

§ 16. **Remedy at Law must reach Necessities of the Case.**—The existence or non-existence of a remedy at law does not always of itself form a test of the right to relief. The remedy at law which will deprive the plaintiff of equitable aid by injunction must appear plain and adequate, and as efficient and practical to secure the ends of justice and its proper and prompt administration as is the remedy in equity. Unless such a legal remedy is shown, a court of equity may lend its extraordinary aid by injunction, notwithstanding the existence of a nominal remedy at law.¹ At the same time it should be borne in mind that by a plain and adequate remedy at law, within the meaning of the rule, is not meant a right to resort to every remedy given by the forms of legal procedure. If any complete and adequate remedy is afforded in form of an action at law, the case falls within the rule which tests the right to resort to equity, and the court will refuse to interfere by injunction.²

The remedy should be such a remedy as is found in the courts

¹ *Watson v. Sutherland*, 5 Wall. (U. S.) 74; *Irwin v. Lewis*, 50 Miss. 363; *La Mothe v. Finke*, 12 Chicago Leg. N. 152; *Boyce's Exrs. v. Grundy*, 3 Pet. (U. S.) 210; *Pride v. State*, 52 Ark. 502; 13 S. W. 135; *Baron v. Krone*, 4 N. Y. S. 434; 51 Hun, 401; *Bronk v. Riley*, 50 Hun, 489; 3 N. Y. S. 446; *Bomeisler v. Forster*, 48 N. E. 534; 154 N. Y. 229; 39 L. R. A. 240; *Drew v. Incorporated Town of Geneva*, (Ind.) 50 N. E. 871; *Wierengo v. Mason*, (Mich.) 74 N. W. 183. Where a person, knowing that the fare between two stations has been mistakenly made less than it should be on a railroad company's rate-sheet, purchased several tickets between said stations, it was held that he would be enjoined from selling the tickets. *Shelton v. Ellis*, 70 Ga. 297. Where a city attempts unlawfully to take away the right of a railroad to load and unload its cars along the city street, equity will not refuse to protect the company simply for the reason that the attempted invasion of its rights is accompanied by acts constituting personal trespass. *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 115; 4 So. 106. Personal property, upon which there were three chattel mortgages, was seized on execution under a judgment in favor of a fourth creditor, and a forthcoming bond was given therefor. One of the mortgagees, upon default, brought a bill for foreclosure, and the appointment of a receiver to preserve the property from sale under the execution. *Held*, that, after the property, or a part thereof, had been seized by the receiver, the debtor and his sureties on the forthcoming bond might maintain a cross-bill against the execution creditor, to enjoin the enforcement of their liability on such bond, and to be discharged therefrom, although they might have a remedy at law. *Bolling v. Vandiver*, 91 Ala. 375; 8 So. 290. One may be enjoined from negotiating mortgages executed for the sole purpose of defeating a mechanic's lien, and in fraud of the right of the mechanic to avail himself of a lien which, but for the mortgages, would exist. *Deacon v. Harris*, 14 Phila. (Pa.) 59.

² *La Mothe v. Fink*, 12 Chicago Legal News, 152.

of the same state. That is not an adequate legal remedy of which the party aggrieved can avail himself only by going into a foreign jurisdiction.¹

Whether a bare legal right to maintain an action at law should determine a party's right to an injunction adversely is a question appealing to the comprehensive judgment of the court in view of all the circumstances of the parties and the situation of the subject-matter involved. The inadequacy of a legal remedy may consist in the fact, either that the party against whom the injunction is asked is persistently pursuing a course of wrongdoing and is insolvent,² or that the injury is of a character not susceptible of measurement or estimation in damages,³ or that a

¹ *Stanton v. Embry*, 46 Conn. 595.

² *Gilmore v. Wells*, 78 Ga. 197; *Wilson v. Hill*, (N. J.) 19 A. 1097. Under an Indiana statute, a creditor, before obtaining a judgment, may have his debtor enjoined from disposing of his property, where it appears that he is about to do so with intent to defraud his creditors. *Morey v. Bull*, 90 Ind. 450.

³ *Bronk v. Riley*, 50 Hun, 489; 3 N. Y. S. 446; *Hat Sweat Manuf. Co. v. Porter*, 34 F. 745. The only remedy whereby just compensation for the invasion of the easements of light, air, etc., by an elevated railroad may be had, is an action in equity to restrain the continuous trespasses, in which an injunction nisi is awarded. *Knox v. Metropolitan El. Ry. Co.*, 58 Hun, 517; 12 N. Y. S. 848. Where the property of plaintiff, which the sheriff has taken under attachments against a third person, is a stock of merchandise, which, in connection with his business, constitutes the whole of plaintiff's resources, trespass or replevin is not an adequate remedy, as damages are recoverable therein only for the value of the goods, and not for the destruction of plaintiff's business, and hence injunction will lie against the closing of plaintiff's store, and the sale of the goods under the attachments. *North v. Peters*, 11 S. Ct. 346. Equity has jurisdiction to restrain an unlawful interference with the water supply of the depot of a railroad company, whereby the latter is obliged, either to provide water for drinking and other purposes, at heavy and continual expense and inconvenience, or to have its water-closets closed or used without water, at the risk of becoming a nuisance, as this is an irreparable damage, for which there is no adequate remedy at law. *Diffendal v. Virginia M. Ry. Co.*, 86 Va. 459; 10 S. E. 536. It was held that the damage threatened by the sinking of a well by respondents is entirely incapable of measurement at law. *Westmoreland & Cambria Nat. Gas Co. v. De Witt*, 130 Pa. St. 235; 18 A. 724. The remedy at law by action of replevin or trover is adequate for the recovery of goods which the consignee had fraudulently transferred to his assignee for the benefit of creditors, and injunction will not lie to restrain their sale. But where such goods, or any part of them, have been sold, injunction will lie to restrain the distribution of the proceeds among creditors, replevin and trover being inadequate in such case for plaintiff's redress. *McDonald v. Bayne*, 58 Hun, 611; 12 N. Y. S. 772. Upon application for an injunction to restrain defendants

legal settlement of the question would involve a multiplicity of suits.¹ But the mere fact that a defendant is insolvent does not of itself furnish sufficient ground for relief by injunction. It should, however, be taken into consideration with other circumstances.²

Landowners are entitled to have a street railroad company which proposes to build its road without just compensation, on a highway laid out under a statute securing to the landowners the right to compensation for any railroad built thereon, perpetually restrained therefrom, though they may have a remedy at law.³

§ 17. *Jurisdiction in Federal Courts.*—In the United States courts the objections to granting relief by injunction is purely a jurisdictional question, and although the party aggrieved has ample remedy at law, he need not take the objection in the pleadings; it may be given effect by the court on its own mere motion upon probable cause.⁴ The jurisdiction of the federal courts to grant injunctions is further restricted by a statute which provides that “the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state.”⁵

from selling land by which the value of the plaintiff's would be greatly impaired, it was held that the injunction should be continued to a hearing on the merits, as if the land were sold the injury might be irreparable. *Marshall v. Stanley County Com'rs*, 89 N. C. 103.

¹ *Lockwood Co. v. Lawrence*, 77 Me. 297; s. c. 52 Am. Rep. 763, holding that where several riparian owners acting independently discharge refuse from their mills into a stream, to the injury of a lower proprietor, an injunction may issue in a suit against all and before any action at law.

² *Heilman v. Union C. Co.*, 37 Pa. St. 100.

³ *Spofford v. Southern Boulevard R. Co.*, 22 N. Y. St. Rep. 246; 4 N. Y. S. 388.

⁴ *Parker v. Winnipiseogee L. C. & W. Co.*, 2 Black, 545. The decision is based upon the sixteenth section of the Judiciary Act of 1789, which provides that “suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy can be had at law.” See also *Western Union Tel. Co. v. Norman* (C. C.) 77 F. 13.

⁵ Rev. Stat. U. S. sec. 720. With one exception mentioned, this provision is not repealed or in any wise affected by section 1979, which declares that every person who, under color of any statute of any state, subjects any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the constitution and laws of the United States, shall be liable to the person injured in an action at law or suit in equity. *Hemslay v. Myers*, 45 F. 288. A complainant alleging that a railroad company

§ 18. **Imminency of Danger which will justify the Writ.** — There is some conflict of views as to what imminency of irreparable injury must be shown to entitle a party to an injunction, as well as to the true meaning of the term. An injunction is never granted except for substantial reasons founded on actual interest. Nor is an injunction justified by the fact that, if there be no intention on the part of the defendant to do the acts feared, the injunction can do no harm.¹ The court will not interfere unless the evidence shows a probability of defendant doing the act which it is sought to restrain.² And when it is apparent that the relief sought is disproportioned to the nature and extent of the injury sustained or likely to be inflicted, the court will decline to interfere by injunction. It is not sufficient that the complainant apprehends or fears the commission of prejudicial acts by the defendant, since there may, in fact, be no substantial grounds therefor; facts establishing the probability of the commission of such acts, unless defendant be restrained, are necessary. Moreover the court must be satisfied that a wrong is about to be committed which would be considerable or irreparable in its nature before relief by injunction will be allowed.³

was, by constructing its road-bed in front of certain docks and brick-yards on the Hudson River, obstructing navigation thereof, whereby he would sustain special injury because he had contracted with the riparian proprietors to transport bricks to New York in his schooner, performance of such contract would thereby be defeated, — *Held*, not entitled to an injunction. The company (acting under authority of the state of New York) invaded no public right, the authority of the state therein being restricted by no United States law. *Ormerod v. New York, West Shore, etc. Ry. Co.*, 21 Blatchf. C. Ct. 106.

¹ *Dunn v. Bryan*, L. R. 7 Eq. 143. See also *Truly v. Warner*, 5 How. 141.

² *Lord Cowley v. Byas*, 5 Ch. D. 944. *Sleicher v. Grogan*, 59 N. Y. S. 1065, 43 App. Div. 213. A complaint which states that the defendant has agreed to furnish the plaintiff with a certain quantity of water for irrigation, and is about to enter into other contracts for the delivery of water to other persons, whereby the defendant will have contracted for the delivery of more water, in the aggregate, than the capacity of his ditch will enable it to supply, does not state facts which entitle the plaintiff to an injunction, for the reason that it does not show that the plaintiff has been or will be injured. *California Bank v. Fresno Canal, etc. Co.*, 53 Cal. 201.

³ *Warfield v. Owens*, 4 Gill, 364; *Goodwin v. York, N. H. & H. R. Co.*, 43 Conn. 494. See *Empire Loan & Building Ass'n v. City of Atlanta*, 77 Ga. 496; *Kerr v. Riddle*, (Tex. Civ. App.) 31 S. W. 328; *Lake Erie & W. R. Co. v. Young*, 135 Ind. 426; *Coffeyville Mining & Gas Co. v. Citizens' Natural Gas & Mining Co.*, (Kan. Sup.) 40 P. 356. The courts may, where justice requires, enjoin the passage of a municipal ordinance, outside the

And yet to entitle a party to an interlocutory injunction, it is not necessary that a wrong should have been already committed. A court of equity will not require that which would in most cases defeat the very purpose for which the relief is sought, by allowing the commission of the act which it is sought to restrain. Satisfactory proof that defendants threaten the commission of a wrong which it is within the power of the court to prevent, constitutes sufficient ground to justify the interference.¹ An injunction will be granted to restrain an irresponsible person from committing threatened injuries.²

Where the threatened injury, if committed, will be of a permanent character, and the future inconvenience and detriment resulting from it, difficult of present computation, a proper case is presented for interference by injunction; as where a city without legal right is about to construct a sewer, and connect it with

scope of the municipal authority, it being apparent that the passage of the ordinance would work irreparable injury, and in such case a temporary injunction may issue before a full hearing. If, however, such ordinance would be void on its face by reason of its unconstitutionality, and no irreparable injury could result from its mere passage, its passage will not be enjoined. *Spring Valley Water Works v. Bartlett*, 8 Sawyer C. Ct. 555; s. c. 16 Fed. Rep. 615. A fund was given to a trustee for the separate use of a married woman for her life with power of appointment by will, and in default thereof to her child. Her husband used the fund, having been substituted as trustee, in purchasing real estate, added his own money, and taking the title to himself as trustee. The wife died, having survived her child, who left an infant heir-at-law. The trustee afterwards died, devising the property to defendant in trust, to convey it to the state of South Carolina on certain conditions, ignoring the claims of the infant heir-at-law. After a bill was filed on behalf of the infant heir, claiming the property with an account of rents and profits, and subpoena served, defendant addressed a letter to the General Assembly of South Carolina asking its acceptance of the property. It was held that the right of complainant to assert her claims was imperilled and an interlocutory injunction would be issued. *Lee v. Simpson*, 87 F. 12.

¹ *McAuthor v. Kelley*, 5 Ohio, 189; *Flood v. Van Wormer*, (N. Y. App.) 41 N. E. 569; 147 N. Y. 284.

² *Sword v. Allen*, 25 Kan. 67. An affidavit and complaint made upon information and belief, and verified by the Belgian consul in New York, alleged that, in pursuance of a conspiracy between the defendants, two of them had, by fraudulent representations, procured from Z., in Belgium, \$17,000, and transmitted the amount by mail in registered letters addressed to the others in New York; that these letters were in the post office in New York; that the defendants had made demand upon the postmaster therefor; and that the defendants were irresponsible. It was held that an injunction restraining the defendants from demanding or receiving the letters was properly granted. *Zellenkoff v. Collins*, 23 Hun (N. Y.), 156.

other sewers, to the great detriment of complainant;¹ or where road commissioners in excess of jurisdiction are about to construct a highway.² And where persons, apparently members of a municipal board authorized by law to direct a public officer to perform a certain act, direct him to perform such act, it will be assumed, in an action to enjoin its performance, that he intends to perform it, if such intention is essential to the maintenance of the action.³ But relief by injunction should not be granted against a defendant who in the presence of the court offers to carry out and perform all that complainant upon his own showing is entitled to.⁴

§ 19. **Not granted for mere Technical Invasion of, or Slight Injury to, Plaintiff's Rights.** — A preliminary injunction will not be granted to restrain a wrong which is a mere technical invasion of plaintiff's rights, and does not threaten serious injury.⁵ Still an injunction will not be refused in a case, otherwise proper, merely because plaintiff's pecuniary interest is small, or because the injunction will afford him slight protection only, and its denial slight injury.⁶

¹ *Morgan v. Binghamton*, 32 Hun (N. Y.), 602.

² *Morgan v. Miller*, 59 Iowa, 481.

³ *Williams v. Boynton*, 42 N. E. 184, 147 N. Y. 426.

⁴ *Behn v. Young*, 21 Ga. 207.

⁵ *Wakeman v. New York, etc. R. Co.*, 35 N. J. Eq. 496; *Blanc v. Blanc*, 47 N. Y. S. 694; 21 Misc. Rep. 268; *De Groot v. Peters*, 57 P. 209; 124 Cal. 406. An injunction to restrain the superintendent of the state insurance department from wantonly injuring the plaintiff corporation's business, — refused, it appearing that he had only expressed in a proper manner and without malice his views of the legality of said business. *Supreme Council Chosen Friends v. Fairman*, 10 Abb. (N. Y.) N. Cas. 162; s. c. 62 How. (N. Y.) Pr. 386. An injunction was sought to restrain defendants from filling in, against the piles of the petitioner's wharf. The filling in was of much importance to the respondents; the sole injury was in the pressure against and partial displacement of the piles. The damage would not exceed \$300, which the respondents were of abundant ability to pay, and the injury could be prevented by the petitioner by an inconsiderable outlay. It was held that the injunction should not be granted. *Hawley v. Beardsley*, 47 Conn. 571. The fact that complainants' traffic, whose volume does not appear, will be compelled to make a *détour* of some 800 feet in consequence of the proposed destruction of the thoroughfare in a vacated portion of a street, does not constitute such irreparable injury as to warrant an injunction, in the face of the undeniable benefit to the public which will accrue from the intended alteration. *Dodge v. Pennsylvania R. Co.*, 43 N. J. Eq. 351; 11 A. 751.

⁶ *Williams v. Western Union Telegraph Co.*, 49 N. Y. Super. Ct. 279. Plain-

When the danger or injury threatened is of a character which cannot be easily remedied, and the answer does not deny that an injury is contemplated, the temporary injunction should be granted unless the case made by the bill is satisfactorily refuted by the defendant.¹ But the refusal of an injunction is not justified by the mere circumstance that the object of the action may be defeated by refusing it, and the court is not for any such reason deprived of all discretionary power in the matter of such refusal.²

The rule that serious injury not reparable at law must appear probable, applies especially where a preliminary injunction is sought to stay the progress of a public work.³ But in most other cases, the fact that the extent of the threatened injury cannot be at present ascertained or depends upon future developments, furnishes sufficient ground for enjoining it.⁴ Thus in actions for the diversion of water, where there is a clear violation of an established right, and a threatened continuance of such violation, it is not necessary to show actual damages or a present use of the water, in order to authorize a court to issue an injunction and make it perpetual.⁵ And the courts have recently shown a strong

tiff had leased premises from a landlord by a lease giving him access to a heater through the basement of the building, which was an appurtenance to plaintiff's premises, giving heat to no other part of the building. Subsequently, the landlord gave a lease to defendant of the basement, and defendant notified plaintiff that he would not thereafter be permitted to pass through the basement to the heater, to which there was no other means of access. *Held*, that this was such an irreparable injury to a settled legal right in real estate as equity would protect by injunction, on an interlocutory application. *Hodge v. Giese*, 43 N. J. Eq. 342; 11 A. 484. One who has acted simply as business manager of a medicine company, another having charge of the medical department, may be enjoined from advertising himself as "late manager" of such company. *Humphreys Homœopathic Med. Co. v. Bell*, 2 N. Y. S. 50.

¹ *United States v. Duluth*, 1 Dillon, 469.

² *Young v. Campbell*, 75 N. Y. 525.

³ *Booraem v. North Hudson Co. R. Co.*, 40 N. J. Eq. 557. Equity will not interfere by injunction with a plan of improvement adopted in good faith by municipal authorities, and within the scope of their authority, where injury therefrom is doubtful, eventual, or contingent. To justify such interference it must be shown that injury material and actual is the necessary or probable result. Reversing s. c. 32 Hun (N. Y.), 602; *Morgan v. Binghamton*, 102 N. Y. 500.

⁴ *Fuller v. Swan River Placer Min. Co.*, 12 Colo. 18; 19 P. 836.

⁵ *Brown v. Ashley*, 16 Nev. 311. A water company will be enjoined from wrongfully diverting the water of a stream to the injury of a mill, although the injury is not irreparable. *Higgins v. Fleming Water Co.*, 36 N. J. Eq.

inclination in cases where there has been an actual invasion of property rights not to apply the maxim *de minimis non curat lex*. Thus when the station of an elevated road projected two feet into the side of a street, it was held that even if it could be considered as a trifling injury it was no objection to the assertion of the property owner's legal rights, and he was entitled to an injunction.¹ On the other hand it was held in a subsequent case that the officers of a charitable society acting in good faith would not be restrained from paying money to a worthy person on the ground that he did not come strictly within the class of beneficiaries entitled to relief from its funds, as the matter was too trivial.²

§ 20. **The Right must be clear.** — To justify granting a preliminary injunction, the plaintiff's right must be certain as to the law and facts.³ In passing upon the facts of each case, it is the right and duty of the court or judge to require a full disclosure of all the facts; and if it is apparent that such disclosure has not been made, relief should be refused.⁴ There must be no evasion, concealment, or misrepresentation of important facts, and if any important facts are wilfully withheld, so that the court is unable to form a judgment upon the merits of the application,

538. But in *Blaine v. Brady*, 64 Md. 373, it was held that the owner of land will not be restrained from maintaining an embankment thereon to protect himself from the waters of a non-navigable stream, merely because, occasionally, when there is a freshet, a few acres of plaintiff's land, part of a farm of more than a hundred acres, are overflowed. Subject fully considered *infra*, § 305.

¹ *Adler v. Metropolitan El. Ry. Co.*, 18 N. Y. S. 858.

² *Woodbury v. Portland Marine Soc.*, (Me.) 37 A. 323.

³ *Noonan v. Grace*, 49 N. Y. Super. Ct., 116; *Hagerty v. Lee*, 45 N. J. Eq. 1, 255; 17 A. 826. An agreement not to enter into a certain business will not be enforced by preliminary injunction, at suit of the assignee of the covenantor, where the defendants are abundantly solvent, and there is doubt whether the agreement, being general, is valid, whether it is supported by an adequate consideration, and whether it is assignable. *American Preservers' Co. v. Norris*, 43 F. 711. An injunction to prevent the disposal of personal property is not warranted unless plaintiff show a specific right to the property, and show that there is danger of its loss unless the courts shall interfere. *Ximenes v. Franco*, 1 Dick. 149. An injunction will not be granted to restrain the erection of a planing-mill and cotton-gin (in process of construction) upon an allegation by the plaintiff that the same, when completed, will expose his premises to increased perils of fire, and that the noise, etc., will render his dwelling unfit for a residence. *Dorsey v. Allen*, 85 N. C. 358; s. c. 39 Am. Rep. 704. Compare *Fulton v. Greacen*, 36 N. J. Eq. 216.

⁴ *Reddall v. Bryan*, 14 Md. 444; *County Commissioners v. Franklin Coal Co.*, 45 Md. 470.

the court should not interpose for the relief of the complainant by injunction.¹ So where it is doubtful what may be ascertained to be the real facts of the case upon final hearing, and also whether the rights of plaintiff will suffer any injury if not protected until final hearing, the court may, in the exercise of a sound discretion, refuse relief by injunction *in limine*.² And, if after full disclosure the right of the plaintiff appears doubtful, a preliminary injunction already granted should be dissolved.³

§ 21. **Not granted where Legal Rights are unsettled.** — It follows as a corollary to the leading proposition of the preceding section that where plaintiff seeks equitable relief by way of injunction in aid of a legal right, the court will not, unless such right is clear, declare the legal right, and grant a perpetual injunction founded on such declaration, but will require the question to be tried at law.⁴ Thus where the parties claimed under different leases

¹ *Sprigg v. Western Telegraph Co.*, 46 Md. 67.

² *Conley v. Fleming*, 14 Kan. 381.

³ *Black Lick Manuf. Co. v. Saltsburg Gas Co.*, 139 Pa. St. 448; 21 A. 432.

⁴ *Council v. Rivers*, 65 N. Car. 54; *Faison v. McIlwaine*, 75 N. Car. 312; *Chambers v. Penland*, 78 N. Car. 53; *Lord v. Beard*, 79 N. Car. 55; *Mayor v. Cardiff Water Works Co.*, 4 De Gex & J. 596; *Smith v. Oconomowoc*, 49 Wis. 694; *New York v. Mapes*, 6 Johns. (N. Y.) Ch. 46; *Bruce v. Delaware, etc. Canal Co.*, 19 Barb. (N. Y.) 371; *Gravesend v. Hoffman*, 1 Alb. L. J. 99; *Appeal of Patterson*, (Pa.) 18 A. 563; *New York Printing and Dyeing Establishment v. Fitch*, 1 Paige (N. Y.), 97; *People v. Harlem Bridge Co.*, 1 Abb. (N. Y.) Pr. n. s. 169 n.; *Jersey City Gas Light Co. v. Consumers' Gas Co.*, 40 N. J. Eq. 427; *Dry Dock East Broadway, etc. R. Co. v. N. Y., etc. R. Co.*, 54 Barb. (N. Y.) 388; s. c. 32 How. (N. Y.) Pr. 193; *Delaware, L. & W. R. Co. v. Central Stock Yard & Transit Co.*, 43 N. J. Eq. 77; 10 A. 602; *Parker v. Bledsoe*, 87 N. Car. 221; *Mammoth Vein Coal Co.'s Appeal*, 54 Pa. St. 183; *Perry v. Parker*, 1 Woodb. & M. (U. S.) 280; *Veterans of Seventh Regiment v. Field Officers of Seventh Regiment*, 5 N. Y. S. 391; *Grant v. Moore*, 88 N. Car. 77; *Murrill v. Murrill*, 84 N. Car. 182; *Chambers v. Penland*, 78 N. Car. 53; *National Docks Ry. Co. v. Central R. R. Co.*, 32 N. J. Eq. 755. "Whenever the right is doubtful, or needs the investigation of a jury upon facts in dispute, a court of equity is always reluctant to interpose its summary authority; for it is rather the duty of the court to protect *acknowledged rights*, than to establish new and doubtful ones." *Roath v. Driscoll*, 20 Conn. 539; *Cheever v. Rutland, etc. R. Co.* 39 Vt. 653; *Murdock's Case*, 2 Bland (Md.), 461; *Burnham v. Kempton*, 44 N. H. 78; *Cummings v. Barrett*, 10 Cush. (Mass.) 186; *Eastman v. Manuf. Co.*, 47 N. H. 71; *New York & N. J. Telephone Co. v. Township of East Orange*, 42 N. J. Eq. 490; 8 A. 289; *Wilson v. Mineral Point*, 39 Wis. 160, distinguished, *Smith v. Oconomowoc*, 49 Wis. 694; *Sheboyhan v. Sheboyhan, etc. R. Co.*, 21 Wis. 667; *Judd v. Town of Fox Lake*, 28 Wis. 583. Where plaintiff's right, as an abutting lot-owner, to prevent the defendant from stretching its lines over the land

diction of the court.¹ And where plaintiff's right depends upon a mere matter of construction of an instrument, relief will be granted, as, the construction of the grant being for the court, the right is not in law doubtful;² also where there are no questions of material facts, but only questions of law at issue.³ Where it is apparent that unless an injunction be granted the injury to plaintiff will be irreparable, slight doubts of his legal rights will not prevent the court from granting relief.⁴ "Where the alternative is interference or probable destruction of the property, there, of course, the court will be ready to render its immediate assistance, even at considerable risk that it may be encroaching on what may eventually turn out to be a legal right of the defendant."⁵

§ 22. **Court's Discretion to grant or refuse Relief.** — The right to a preliminary injunction is generally addressed to the sound discretion of the court to be exercised according to the circumstances of each case.⁶ But the doctrine that the granting of an application for preliminary injunction is purely a matter of judicial discretion, is subject to modification. A distinction has been drawn between cases where it is sought in aid of private right, and where it is asked in some matter *publici juris*. In the latter class of cases, it is held that the remedy being in the nature of a prerogative remedy, when sought by the Attorney-General in behalf of the people, courts have no judicial discretion in the matter of granting the writ, but an absolute duty devolves upon them to exercise their jurisdiction to accomplish the public object.⁷

The discretion to be exercised in granting or refusing the writ is not purely arbitrary, but is governed by the rules of law and equity, which are not to oppose, but each in its turn to subserve the other. This discretion in some cases follows the law implicitly; in others, assists it and advances the remedy; in

¹ *Low v. Holmes*, 2 C. E. Green, 148.

² *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 115; 4 So. 106.

³ *Appeal of Rankin*, (Pa.) 16 A. 82. See also *Westmoreland & Cambria Nat. Gas Co. v. De Witt*, 180 Pa. St. 235; 18 A. 724.

⁴ *Marshall v. Commrs. of Stanley Co.*, 89 N. Car. 103; *Newall v. Staffordville Gravel Co.*, (N. J.) 11 Cent. R. 606.

⁵ *Shrewsbury, etc. R. Co. v. Shrewsbury, etc. R. Co.*, 1 Sim. n. s. 410.

⁶ *Stoddart v. Vanlaningham*, 14 Kan. 18; *Akin v. Davis*, 14 Kan. 148; *Olmstead v. Koester*, 14 Kan. 463.

⁷ *Attorney-General v. Railroad Companies*, 85 Wis. 425.

others again, it relieves against the abuse or allays the rigor of it; but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to courts of equity. Discretionary power to do this, no court, not even the highest, is intrusted with.¹ Subject to these restraints the granting or withholding of an interlocutory injunction is a matter vested in the sound discretion of the court, to be exercised according to the circumstances of each case.²

Within the legitimate exercise of their discretion inferior courts will not be arrested or interfered with by higher courts; a mandamus will not lie to compel an inferior court or judge either to grant or to dissolve an injunction.³ The utmost care should be used however in the exercise of this jurisdiction, and the relief, being extraordinary, should only be administered when a case is presented showing a clear necessity for immediate protection to some right or interest of the complainant, which otherwise would be seriously and irreparably injured or impaired.⁴

§ 23. *Writ refused where Cause of Justice would be retarded or defeated by granting it.* — An injunction will not be granted where it would cause great injury to the defendant and might be a serious detriment to the public without corresponding benefit to the plaintiff.⁵ The question of relative convenience or in-

¹ *Hayward v. Cope*, 25 Beav. 151, per Lord Romilly, quoting from Master of the Rolls, in *Burgess v. Wheat*, 1 Eden, 214. The circumstance that the object of the action may be defeated by refusing a temporary order, as here, enjoining the collection of a tax for paying certain town bonds issued in aid of a railroad, is not of itself sufficient to deprive the court of all discretionary power in the matter. *Young v. Campbell*, 75 N. Y. 525. And in no event will an injunction be granted, where the effect would be to encourage litigation and a multiplicity of suits, for the ends of justice would be thereby retarded and not promoted. *Endicot v. Mathis*, 1 Stockt. 110.

² *Reddall v. Bryan*, 14 Md. 444; *State v. Judge*, (La.) 26 So. 374.

³ *Ex parte Hays*, 26 Ark. 510; *McMillen v. Smith*, *Ib.* 613; *Ex parte City Council of Montgomery*, 24 Ala. 98; *State v. Judge of Sixth District Court*, 28 La. An. 905; *People v. Judge of St. Clair Circuit*, 31 Mich. 456. Where a court has jurisdiction, an order granting an injunction, though it may be erroneous, is not void, and its force is not impaired pending an appeal. *Fleming v. Patterson*, 99 N. C. 404; 6 S. E. 396.

⁴ *Osborn v. Taylor*, 5 Paige, 515; *Beebe v. Guinault*, 29 La. An. 795. Where the status of property forming the subject of the application, or the relations of the parties thereto, is in the condition which has existed for a long period of years, a preliminary injunction will not be granted unless an alteration or change is shown to be threatened or impending. *Society v. Holsman*, 1 Halst. Ch. 126.

⁵ *Torrey v. Camden, etc. R. Co.*, 18 N. J. Eq. 293; *Mayne v. Fairhaven*,

convenience which may result to the parties by granting or withholding the writ, is also often important. If, upon due consideration of such question, it is apparent that the act complained of is likely to result in irreparable injury to complainant, and the balance of inconvenience preponderates in his favor, the injunction will be granted. On the other hand, if it appears that the greater danger or inconvenience will result to defendant rather than to plaintiff from granting it, or when the inconvenience seems equally divided as between the parties, the injunction will be refused, and the parties left as they are until a determination of legal rights can be had at law.¹ Equal consideration will be given to the inconvenience, loss, or injury to which the plaintiff would be subjected by a refusal to grant the injunction.²

§ 24. **Not a Remedy to prevent Crime or to preserve Morality.**—Equity has no jurisdiction to interpose for the prevention of crime, or to enforce moral obligations, nor will it interfere for

8 Cush. (Mass.) 653; *Attorney-General v. Lunatic Asylum*, L. R. 4 Ch. App. 146; *Salem v. Eastern R. Co.*, 98 Mass. 431; *Hart v. Albany*, 3 Paige (N. Y.), 213; *Chesapeake, etc. Co. v. Young*, 3 Md. 480.

¹ *Cory v. Yarmouth & N. R. Co.*, 3 Hare, 593; *Shrewsbury & C. R. Co. v. Shrewsbury & B. R. Co.*, 1 Sim. n. s. 410; *Attorney-General v. Mayor, etc.*, 1 Myl. & Cr. 171; *Greenhalgh v. Manchester & B. R. Co.*, 3 Myl. & Cr. 784; *Hilton v. Granville*, 1 Cr. & Ph. 283; *Fullenwider v. Supreme Council of Royal League*, 73 Ill. App. 321; *Mackintyre v. Jones*, 9 Pa. Super. Ct. 543; *Morris & E. R. Co. v. Prudden*, 5 C. E. Green, 530; *Hackensack Improvement Commission v. New Jersey Midland R. Co.*, 7 C. E. Green, 94; *McCorkle v. Brem*, 76 N. C. 407; *Dyke v. Taylor*, 3 De G. F. & J. 467; *Fielden v. Lancashire & Y. R. Co.*, 2 De G. & Sm. 531; *Elwes v. Payne*, 12 Ch. D. 468. An injunction obtained by the state, restraining a firm from dealing in the stock certificates of a corporation, should be dissolved when it appears that they are not acting as agents, and no reason is set forth why they should be restrained and the rest of the world left at liberty. *State v. American Cotton Oil Trust*, 40 La. An. 8; 3 So. 409.

² *Wason v. Sanborn*, 45 N. H. 169; *Wilcox v. Wheeler*, 47 N. H. 488; *Bassett v. Manuf. Co.*, 47 N. H. 426; *Ingraham v. Dunnell*, 5 Met. (Mass.) 126; *Hartridge v. Rockwell*, R. M. Charl. (Ga.) 260; *Read v. Dews*, R. M. Charl. (Ga.) 358; *Attorney-General v. Ely, H. & S. R. Co.*, B. L. R. 6 Eq. 106. Where the injury which would result to the defendant if an injunction were temporarily granted would greatly exceed the benefits which might accrue to plaintiff if the injunction were properly granted, the court should refuse the interlocutory application. *Olmstead v. Koester*, 14 Kan. 463. But upon a clear case of irreparable injury unless an injunction is granted, being presented, and it not appearing that the issuance of the writ will work any such injury to defendants, the relief should be granted. *Brown v. Pacific Company*, 5 Blatchf. 525.

the prevention of illegal acts, merely because they are illegal.¹ Nor have courts of equity jurisdiction to prevent by injunction the institution of *bona fide* prosecutions for criminal offences, whether the same be violations of state statutes or municipal ordinances.² But it was held that where criminal prosecutions were threatened under color of an invalid statute for the purpose of compelling the relinquishment of a property right, the remedy in chancery was available, and a preliminary injunction might properly issue.³ Aid will not be extended by injunction to restrain the violation of public or penal statutes, or in any such case, in the absence of any injury to property rights.⁴ One reason for non-interference is a fundamental want of jurisdiction, another is the existence of an adequate remedy at law. In other words the subject-matter of equity jurisdiction is the protection of civil rights and private property, and not the punishment or prevention of crime or immoral acts when not in connection with violations of private right. An injunction was refused, where no private interests were to be thereby protected, to prevent persons from carrying on the business of banking in violation of the statutes restraining incorporated banking associations.⁵ Relief was refused where it was sought to enjoin defendants from running their street cars on Sunday, in violation of a statute making it a penal offence. The case was held to be not altered by the fact that the action was brought by pewholders and property owners on the line of defendant's track.⁶ And it

¹ *Finegan v. Allen*, 46 Ill. App. 553; *Rice v. Jefferson*, 50 Mo. App. 464; *Neaf v. Palmer*, (Ky.) 45 S. W. 506; *Fisher v. Lakeside Park Hotel & Amusement Co.*, 4 Ohio N. P. 829; *Village of New Rochelle v. Lang*, (Sup.) 27 N. Y. S. 600; 75 Hun, 608; *Manor Casino v. State*, (Tex. Civ. App.) 34 S. W. 769; *State v. Patterson*, (Tex. Civ. App.) 37 S. W. 478.

² *Paulk v. City of Sycamore*, 104 Ga. 24; 80 S. E. 417; *Lecourt v. Gaster*, 21 So. 646; 49 La. An. 487; *Yellowstone Kit v. Wood*, (Tex. Civ. App.) 43 S. W. 1068.

³ *Central Trust Co. v. Citizens' St. R. Co.*, (C. C.) 80 F. 218; *Pre-digested Food Co. v. McNeal*, (Super. Ct. Cinn.) 4 O. L. D. 356.

⁴ *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 371; *Sparhawk v. Union P. R. Co.*, 54 Pa. St. 401; *Emperor of Austria v. Day*, 3 De G. F. & J. 217; *Babcock v. New Jersey S. Y. Co.*, 5 C. E. Green, 296. But where it is apparent that neither of the parties to the litigation is entitled to the exercise of the right or privilege in controversy, and that such right properly pertains to the public, a court of equity, acting in behalf of the public, will enjoin both parties, although the state is not a nominal party to the cause. *The Wharf Case*, 3 Bland, 361.

⁵ *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 371.

⁶ *Sparhawk v. Union P. R. Co.*, 54 Pa. St. 401.

may be stated as a general rule governing courts of equity in administering this form of relief, that they will in no case interfere with the administration of criminal law.¹ The rule extends to cases in which a remedy has been provided in the form of information by *quo warranto*, the latter remedy being *pro forma* criminal.²

The principle of non-interference to prevent crime is no reason however for not interposing in the important branch of equity involving frauds. Many frauds not only affect private rights and property interests, but constitute crimes. Courts have generally avoided all attempts to define fraud, reserving to themselves full liberty to deal with it in whatever aspect it may be presented. Cases are frequently presented in which injunctions are sought and granted upon the ground of fraud, in proceedings at law. Nor is the fact that the act sought to be restrained constitutes a crime any reason for refusing an injunction, where irreparable injury to property rights is also threatened.³ And

¹ *Gault v. Wallis*, 53 Ga. 675 ; *Joseph v. Burk*, 46 Ind. 59 ; *Moses v. Mayor of Mobile*, 52 Ala. 198. Equity cannot enjoin the publication of a libel. *Kidd v. Horry*, 28 Fed. Rep. 778. Nor will the court enjoin the police from interfering with A.'s business on the ground that he is so conducting it as to violate the criminal laws. *Kramer v. New York Police Board*, 53 N. Y. Super. Ct. 492.

² In *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 371, which was a proceeding in *quo warranto*, Ch. Kent said: "If the defendants are carrying on banking operations contrary to law, they ought, undoubtedly, to be restrained; but I cannot be of the opinion that the operation is such a mischievous nuisance as to require the immediate and extraordinary process of this court to abate it. I know that this court is in the practice of restraining private nuisances to property, and in quieting persons in the enjoyment of private right; but it is an extremely rare case, and may be considered, if it ever happened, as an anomaly, for a court of equity to interfere at all, and much less preliminarily, by injunction, to put down a public nuisance which did not violate the rights of property, but only contravened the general policy. The plain state of the case, then, is that an information is here filed by the Attorney-General, to redress and restrain, by injunction, the usurpation of a franchise, which if true amounts to a breach of law and of public policy. I may venture to say, that such a prosecution is without precedent in this court, but it is supported by a thousand precedents in the courts of law. How, then, can I hesitate on the question of jurisdiction? The whole question, upon the merits, is one of law, and not of equity. The charge is too much in the nature of a misdemeanor to belong to this court. The process of injunction is too peremptory and powerful in its effects to be used in such a case as this, without the clearest sanction. I shall better consult the stability and utility of the powers of this court, by not stretching them beyond the limits prescribed by the precedents."

³ *Barrett v. Mt. Greenwood Cemetery Ass'n*, (Ill. Sup.) 42 N. E. 891; 159

it was held that a court of equity has jurisdiction to enjoin the obstruction of the mails and the highways used in interstate commerce, though such obstruction amounts to a public nuisance, for which a criminal prosecution would lie; and that the punishment imposed by such court for violation of its injunction is not an exercise of criminal jurisdiction.¹ And in another case that injunction will, at the suit of the state, lie against a corporation where it is misusing and abusing its corporate franchises and privileges, and is maintaining its property as a nuisance, though its acts also constitute a crime.² But where fraud is relied upon as the foundation for an injunction, the allegations in the bill must be of specific and definite acts of fraud, and not mere general averments.³

§ 25. **Only granted upon Positive Allegations.** — Being a severe remedy an injunction will not be granted in the first instance except upon a clear *prima facie* case, and upon positive averments of the equities on which the application for the relief is based. The complainant must allege positively the facts constituting his grounds for relief, although it is not essential that he should establish his case, upon an application for an interlocutory injunction, with the same degree of certainty that would be required upon the final hearing.⁴ Mere argumentative alle-

Ill. 385; *Kaufman v. Stein*, (Ind. Sup.) 87 N. E. 333; *Davis v. Zimmerman*, 36 N. Y. S. 303, 91 Hun, 489; *Elder v. Whitesides*, (C. C.) 72 F. 724; *Shaw v. Interstate Savings, Loan, & Trust Corp.*, 5 Ohio N. P. 411; *Tiede v. Schneidt*, 99 Wis. 201; *State v. Patterson*, 14 Tex. Civ. App. 465; *Grey v. New York & P. Traction Co.*, (N. J.) 40 A. 21; *Vegelahn v. Guntner*, (Mass.) 44 N. E. 1077; 167 Mass. 92; 85 L. R. A. 722.

¹ *In re Deba*, 15 S. Ct. 900; 158 U. S. 564.

² *Columbian Athletic Club v. State*, 40 N. E. 914; 143 Ind. 98.

³ *Powell v. Parker*, 38 Ga. 644. So where a city attempts, by an ordinance, to deprive a railroad of a vested right to load and unload its freight cars along a city street, equity will not refuse to interfere in behalf of the railroad, simply because the ordinance is *quasi* criminal in character. *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 115; 4 So. 106. And where an ordinance prohibiting a gas company from carrying on its business except on certain conditions is void as to such company, its attempted enforcement by repeated prosecutions of the company's employees will be enjoined. *City of Rushville v. Rushville Natural Gas Co.*, (Ind. Sup.) 28 N. E. 853.

⁴ *Jones v. Macon & B. R. Co.*, 39 Ga. 138; *Perkins v. Collins*, 2 Green Ch. 482; *Bank of Orleans v. Skinner*, 9 Paige, 305; *Bogert v. Haight*, Ib. 297; *Holdredge v. Gwynne*, 3 C. E. Green, 26; *Campbell v. Morrison*, 7 Paige, 157. The mere general allegation of irreparable injury does not warrant an injunction. The facts must appear upon which the allegation is predicated, to enable

gations or inferences from the facts stated do not suffice to meet the requirements of the rule requiring allegations to be specific;¹ and the relief will not ordinarily be allowed where the facts upon which complainant's equities rest, are stated only upon information and belief.²

§ 26. **Party seeking Relief must not be himself at Fault.** — As the relief is of a purely equitable character, the plaintiff must come within the equitable conditions generally imposed upon parties asking equitable relief. He must be prepared and willing to do equity, and must come into court with clean hands. If, for instance, he seeks to have enjoined the sale of mortgaged premises about to be sold for an amount greater than is due to the mortgagor he must make and allege an offer to pay the sum actually due.³

A complainant securing the aid of a court of equity by injunction must not have been guilty of *laches* or delay in asserting his rights; for while delay may not amount to proof of acquiescence in the wrong for which redress is sought, yet it may suffice to prevent his obtaining relief by injunction.⁴ It may be asserted

the court to judge as to the nature of the injury. *Branch v. Supervisors*, 13 Cal. 190; *Leitham v. Cusick*, 1 Utah, 242.

¹ *Battle v. Stephens*, 32 Ga. 25.

² *Jones v. Macon & B. R. Co.*, 39 Ga. 138; *Youngblood v. Schamp*, 2 McCart. 42; *Armstrong v. Sanford*, 7 Minn. 49. It is held in New York that a preliminary injunction should not be granted where the material facts are averred merely on information and belief. *Waddell v. Bruen*, 4 Edw. (N. Y.) Ch. 671; *Williams v. Lockwood, Clark* (N. Y.) Ch. 172. And in California, that it should not issue where the answer denies all the equity of the bill. *Crandall v. Woods*, 6 Cal. 449. See *Everly v. Rice*, 4 N. J. Eq. (3 Green) 553. And the view seems to prevail in Maryland that the averments of the bill, upon the information of the party complaining, will not be sufficient, unless he state his sources of information. *Blondheim v. Moore*, 11 Md. 365.

³ *Stringham v. Brown*, 7 Iowa, 33; *Sloan v. Boolbaugh*, 10 Iowa, 31; *Waffenden v. Waffenden*, 1 Ariz. 328. See *Broadbent v. Imperial Gas Co.*, 7 De G. M. & G. 436; s. c. 3 Jur. n. s. 221; 26 L. J. Ch. 276; *Hunt v. Peak*, 1 Johns. 705.

⁴ *Attorney-General v. Sheffield G. C. Co.*, 3 De G. M. & G. 304; *Dulin v. Caldwell*, 28 Ga. 117. Where an injunction for the protection of property while the decision of the legal title is pending is sought, plaintiff must state facts showing a strong *prima facie* case, and that he has not been guilty of great delay in applying for the relief sought. *Del. & Rar. Canal & C. & A. R. T. Co. v. Rar. & Del. Bay R. Co.*, 1 C. E. Green, 380; *Russ v. Wilson*, 22 Me. 211; *Pillow v. Thompson*, 20 Tex. 206; *Tash v. Adams*, 10 Cush. (Mass.) 252; *Fuller v. Melrose*, 1 Allen (Mass.), 166; *Gray v. Ohio, etc. R. Co.*, 1 Grant Cas. (Pa.) 416; *Briggs v. Smith*, 5 R. I. 213; *Phelps v. Peabody*, 7 Cal. 50;

as a general rule that long acquiescence on the part of the plaintiff in a state of things which he afterward seeks to have enjoined, will constitute sufficient ground for refusing the desired relief.¹

§ 27. **Considered with Respect to Period of Duration.** — With reference to their duration injunctions are usually called temporary, preliminary or interlocutory, and perpetual. An interlocutory injunction may become perpetual upon a final hearing, but a perpetual injunction may be decreed as part of the final judgment, though no preliminary or intermediate relief of that character may have been previously granted. Still it is necessary that plaintiff should allege in his bill of complaint facts showing his right to a perpetual injunction against the defendant. He must show both by his pleadings and proof such a state of facts as necessitate an interference by the court to protect his rights, and if he fail to do this the court will refuse either to make a temporary injunction already granted perpetual, or to perpetually enjoin the defendant as part of the general relief.²

§ 28. **Injunction "pendente lite."** — The failure to obtain an interlocutory injunction upon filing the bill will not deprive complainant of its benefit at a later stage of the proceedings. If the facts alleged warrant it, temporary preventive relief will be granted at any time before a final hearing; and even if his bill as first presented fail to entitle him to an injunction for the reason that the necessary facts do not then exist, yet if such facts arise afterwards during the pendency of the action, they may be brought to the attention of the court by supplemental bill, and a temporary order obtained.³ Thus an injunction may be granted

Little v. Price, 1 Md. Ch. 135; Sheldon v. Rockwell, 9 Wis. 167; Peabody v. Flint, 6 Allen (Mass.), 52; Senior v. Pawson, L. R. 3 Eq. 330.

¹ Gt. Western R. Co. v. Oxford R. Co., 3 De G. M. & G. 341.

² Bunhoun v. Kempton, 45 N. H. 78; Spangler v. Choiland, 43 Ohio St. 526; Bonaparte v. Camden, etc. R. Co., 6 Baldw. (N. H.) 218; Whalen v. Dalashmutt, 59 Md. 250.

³ Blakemore v. Glamorganshire, 1 Myl. & K. 154; Wallace v. McVey, 6 Ind. 300; s. p. Real Del Monte, etc. Co. v. Pond, etc. Co., 23 Cal. 82; Mut. Life Ins. Co. v. Newburg Bank, 79 N. Y. 568; Flagg v. Sloan, 16 Ind. 432; Hicks v. Michael, 15 Cal. 107; Attorney-General v. Paterson, 9 N. J. Eq. (1 Stock.) 624; Ward v. Dewey, 7 How. Pr. (N. Y.) 17; New Jersey Zinc & Iron Co. v. Trotter, 38 N. J. Eq. 3; Coruing v. Troy, etc. Factory, 6 How. (N. Y.) Pr. 89; Johnson v. Hall, 83 Ga. 281; 9 S. E. 783; Zinsser v. Cooledge, 17 Fed. Rep. 538. See Hamilton v. Eden Gold Mining Co., 75 Ga. 447; International Tooth Crown Co. v. Mills, 22 Fed. Rep. 659; McHenry v. Jewett, 90 N. Y. 58. Where a bill to quiet title is filed, showing that com-

to protect the possession of officers *de facto* against the interference of claimants whose title is disputed, until the latter shall establish their title by the judicial proceeding provided by law.¹ And where a defendant, pending an action at law, files a cross-complaint asking an injunction against the plaintiff, he must make the same showing of equities and facts to entitle him to the relief as a party would upon original application.²

§ 29. **Notice to Defendant as affecting Sufficiency of Allegations.** — Where the application is made without notice to the defendant, and the allegations of the bill are stated upon information and belief, the proceedings cannot be sustained upon the hearing in the absence of proof of their correctness. In such

plainant is in possession of the land described, with other allegations sufficient to entitle him to the relief claimed, and afterwards defendants file a bill for the partition of the same lands, to which the complainant in the first bill is not made a party, such complainant may, without becoming a party to the partition suit, have it restrained until his suit is determined. *McCullough v. Absecom Land Imp. Co.*, (N. J.) 10 A. 606. But where a creditor's bill was filed to set aside as fraudulent a conveyance of lands, about a half of which was woodland, it was held, that an injunction which restrained the grantee from cutting and removing the wood from the premises would not be continued, it appearing that the value of the land without the wood was able to satisfy the creditor's claim, in case the conveyance should ultimately be annulled. *Portland Building Assoc. v. Creamer*, 34 N. J. Eq. 107. If, pending a suit brought under N. Y. Code, 1638, by plaintiff in possession of real estate, to determine the title thereto, there is danger of an unlawful interference with plaintiff's possession, he may be protected by injunction. *Stamm v. Bostwick*, 30 Hun (N. Y.), 156.

¹ *Guillotte v. Poincy*, 41 La. An. 333; 6 So. 507.

² *Kimball v. Lee*, 43 N. J. Eq. 277; 10 A. 285. Where a suit was brought by the heirs and administrator of A. against his widow, in the circuit court of Iowa, to determine her rights under an antenuptial contract, — *held*, that the district court had jurisdiction, pending the action, to enjoin the heirs and administrator from interfering with her right of temporary homestead in land occupied by her and her husband as such during the marriage; and such jurisdiction was not affected by the fact that she asked other relief to which she was not entitled. *Collins v. Collins*, 72 Iowa, 104; 33 N. W. 442. In an action of ejectment, where defendant files a cross-complaint, and seeks to enjoin plaintiff from asserting any title to the property, pending a decision of the demurrer to the cross-complaint, defendant cannot, upon motion of affidavits, obtain a perpetual injunction, but must await the result of the proceedings. *Petersen v. Weissbein*, 70 Cal. 423; 12 P. 415. Where defendant tenders money into court, and the court, after giving judgment for plaintiff, wrongfully applies such money in payment of costs and part payment of plaintiff's judgment, and the plaintiff so receives it, defendant is not entitled to an injunction against proceedings by the plaintiff to enforce his judgment. *Chicago & E. I. R. Co. v. Kamman*, 119 Ill. 362; 10 N. E. 217.

case all the material and essential allegations not directly and positively stated in the bill must be established by evidence.¹ Unless a pressing necessity be shown, a temporary injunction should not be granted without notice;² nor, except upon a case clearly made showing an equitable right to the interference of the court, a substantial ground to apprehend such loss or damage as cannot be compensated for.³ And yet, where the injunction is granted upon notice to the defendant, the fact that many of the material averments of the bill are stated upon information and belief, will not prevent the granting of the relief, where defendant in no manner denies such averments.⁴

§ 30. **Where Court will enjoin without Special Application.**— It seems to be settled in England that courts may, under certain circumstances, grant an injunction upon the final hearing of the case, although not prayed for by the bill. Thus, it was held, after a decree in a foreclosure, that the mortgagor in possession may be restrained from committing waste, although no injunction is sought by the bill.⁵ But in this country, unless there be special statutory modifications of the general rule, injunction is a specific relief which must be specially prayed. In the exercise, however, of its ample discretionary powers, a court of equity may revive an injunction after its dissolution upon a proper subsequent showing of complainant's right to relief.⁶ Still if a court of equity has already acquired jurisdiction over the subject-matter of the action and of the parties thereto, it would seem that no bill is necessary. Obedience to an order which a party to the action is bound to take in consequence of his being either actually or constructively a party to the suit, may be enforced by a writ of injunction, issued upon proper application in the cause without the filing of a bill.⁷ But an injunction will not

¹ *Dinehart v. Lafayette*, 19 Wis. 677.

² *Androvette v. Bowne*, 15 How. (N. Y.) Pr. 75; s. c. 4 Abb. (N. Y.) Pr. 440.

³ *Wallace v. McVey*, 6 Ind. 800; *Flagg v. Sloan*, 16 Ind. 432; *Androvette v. Bowne*, 4 Abb. (N. Y.) Pr. 440; s. c. 15 How. (N. Y.) Pr. 75; see also *Real Del Monte, etc. Co. v. Pond, etc. Co.*, 23 Cal. 82.

⁴ *Gibson v. Gibson*, 46 Wis. 462.

⁵ *Goodman v. Kine*, 8 Beav. 379; *Bloomfield v. Eyre*, 8 Beav. 250.

⁶ *Walker v. Devereaux*, 4 Paige (N. Y.), 229.

⁷ This being the case, it is clear that where sufficient new facts are stated in a supplementary bill to warrant an injunction, it will be granted, notwithstanding a prior dissolution of the injunction granted on the original

issue unless the facts of the case warrant it, even though both parties consent, especially where to allow it would be to interfere with the rights of third parties.¹

§ 31. **Preliminary, or interlocutory, and perpetual distinguished.** — With respect to the stage of the proceedings when an injunction issues and its effect upon the rights of parties and the status of things, it is either temporary, sometimes called remedial, or perpetual, sometimes called judicial.² An interlocutory injunction is merely provisional in its nature, and does not conclude a right, while the perpetual injunction is a final decree upon full hearing, and concludes all parties in interest. An interlocutory injunction cannot be used to take property out of the possession of one party and transfer it to the possession of another. It does not go to the extent of ordering undone what has been already done; if allowed to be employed for that purpose, it might thereby be productive of as much injury to defendant as that of which the aggrieved party complains.³ An interlocutory or temporary injunction is at all times subject to motion to vacate or modify, though in granting it the court may have chosen to discuss the merits of the case.⁴

The perpetual form is often mandatory because, as it issues after a final decree, it may operate as an execution to enforce the same. For instance, it may contain a direction to the defendant to yield up or to quit or to continue the possession of

bill. *Fanning v. Dunham*, 4 Johns. Ch. 35. Where on an application for an injunction to abate a nuisance respondents concede facts which, if established at the final hearing, would require an injunction to issue, the presiding judge, in his discretion, can order a preliminary injunction. *Carleton v. Rugg*, 149 Mass. 550; 22 N. E. 55.

¹ *Whelpley v. Erie*, 6 Blatch. 271. An already accomplished fact will not be enjoined; nor will a mandate issue to enforce rights unless the enforcement be specifically asked for. *Trevique v. Orleans School Board*, 31 La. An. 105.

² Story's Eq. sec. 861.

³ *Murdock's Case*, 2 Bland, 461; *Bosley v. Susquehanna Canal*, 3 Bland, 63; *Farmers' R. Co. v. Reno O. C. & P. R. Co.*, 53 Pa. St. 224; *Washington University v. Green*, 1 Md. Ch. 97; *Audenried v. Philadelphia & R. Ry. Co.*, 68 Pa. St. 370. The plaintiff, in an action on a note, attached a lot of land which the defendant had fraudulently conveyed to put it beyond the reach of creditors. *Held*, that the grantee might be enjoined temporarily from disposing of it. *Joseph v. McGill*, 52 Iowa, 127.

⁴ *Westerly Waterworks v. Town of Westerly*, (C. C.) 77 F. 783; *Seamen's Friend Soc. v. Same*, Id.

land or other property which constitutes the subject-matter of the decree.¹

§ 32. **Preliminary Injunction not granted to decide Ultimate Rights of Parties.** — Where the possession either of real or personal property is in dispute, a court of equity will not, upon the unsupported showing of the bill, grant an injunction, whose effect would be to award possession to one of the parties, and thus determine the merits of the case upon an *ex parte* application.² This rule however has no application where defendant's possession is but an interruption of the prior and lawful possession of complainant, the right of the latter being clear and certain; and equity may interfere in such case without compelling complainant to establish his title by an action at law.³

§ 33. **Subdivision of Preliminary Injunctions.** — Preliminary or interlocutory injunctions are classified as "special" and "common," though this classification is at the present day of but little use. Those designated as "common" are usually granted in aid of certain equities in favor of the plaintiff, and without notice.⁴ As a rule special injunctions are granted as preventive aids where equity is the only relief sought, and upon notice to the defendant. They are not allowed as of course upon the coming in of a bill.⁵ It is not necessary, as a foundation for the issuance of a special injunction, that other equities exist in favor of plaintiff. It may issue to stay waste or prevent other irreparable injury, though plaintiff's ultimate right be strictly legal.⁶

¹ Eden on Injunct. ch. 1, pp. 1, 2; 3 Wooddes. Lect. 56, p. 397; Jeremy on Equity Jurisd. B. 3, p. 308, etc.; Gilb. Forum Roman. ch. 11, pp. 194, 195; Stribley v. Hawkie, 3 Atk. 275; Huguenin v. Basely, 15 Ves. 179.

² Martin v. Broadus, Freem. Ch. 85; Deklyn v. Davis, Hopk. Ch. 135; *Ex parte* Conway, 4 Ark. 302; McGee v. Smith, 1 C. E. Green, 462; Kelly v. Morris, 31 Ga. 54.

³ *Ex parte* Conway, 4 Ark. 302.

⁴ As to distinction between common and special injunctions, see Woodworth v. Rogers, 3 Woodb. & M. (U. S.) 135; Purnell v. Daniel, 8 Ired. (N. C.) Eq. 9; Patterson v. Gordon, 3 Tenn. Ch. 18; Anderson v. Noble, 1 Drew. 143; Magnay v. Mines Royal Co., 3 Drew. 130; Troy v. Normont, 2 Jones, (N. C.) Eq. 318; Petersen v. Matthis, 3 Jones (N. C.) Eq. 31; Chadwell v. Jordan, 2 Tenn. Ch. 635.

⁵ Woodworth v. Rogers, 3 Woodb. & M. 135; Purnell v. Daniel, 8 Ired. Eq. 9; Patterson v. Gordon, 3 Tenn. Ch. 18; Anderson v. Noble, 1 Drew. 143; Magnay v. Mines Royal Co., 3 Drew. 130; Troy v. Normont, 2 Jones Eq. 318; Petersen v. Matthis, 3 Jones Eq. 31; Chadwell v. Jordan, 2 Tenn. Ch. 635.

⁶ Purnell v. Daniel, 8 Ired. Eq. (N. C.) 9; Bradford v. Peckham, 9 R. I. 250; Woodworth v. Rogers, 3 Woodb. & M. (U. S.) 135.

But in the federal courts all injunctions are special, and are issued only upon notice to the parties sought to be enjoined.¹ So in Tennessee the common injunction no longer exists; every injunction being special.²

§ 34. **When granted to Defendant.** — It sometimes occurs upon final presentation of the facts of a case that defendant is entitled to affirmative relief in the form of an injunction against the plaintiff; but defendant is not entitled to relief in this form unless he have an equitable defence not available at law, or a good defence at law which, by reason of fraud or accident without any negligence on his part, he was prevented from interposing.³ A defendant may, if the facts warrant it, have a preliminary injunction on filing a cross-bill, or in states having a code, an answer stating facts sufficient to entitle him to the relief. But defendant will not be entitled to an injunction although the court be of the opinion that the defence should have prevailed, where all his rights may be enforced in an appellate court on proper proceedings.⁴

§ 35. **Essentials of the Writ.** — In order to impose upon the defendant the duty of obedience to an injunction writ, it is essential that such writ should clearly apprise him of what he is required to do or abstain from doing.⁵ No particular form of phraseology is required, however, and the writ should be varied to meet the peculiar circumstances of each particular case. Upon an authentic notification of what is required; he must then

¹ Rev. Stat. U. S. 718; *Perry v. Parker*, 1 Woodb. & M. (U. S.) 280.

² *Patterson v. Gordon*, 3 Tenn. Ch. 19.

³ *Hendrickson v. Hinckley*, 17 How. (U. S.) 448; *Walker v. Robbins*, 14 How. (U. S.) 584; *Johnson v. Lyon*, 14 Iowa, 481; *Holmes v. Strateler*, 57 Ill. 209; *Vennum v. Davis*, 35 Ill. 568; *Hinrichsen v. Van Winkle*, 27 Ill. 334; *M. E. Church v. Baltimore*, 6 Gill (Md.), 391; *Kemp v. Tucker*, L. R. 8 Ch. App. 369; *Neville v. Wilkinson*, 1 Bro. C. C. 543; *Gray v. Mathias*, 5 Ves. 286; *Money v. Jordan*, 2 De G. M. & G. 818; *Duckworth v. Duckworth*, 35 Ala. 70; *Brandon v. Green*, 7 Humph. (Tenn.) 130; *Gibson v. Moore*, 22 Tex. 611; *Chadoin v. McGee*, 20 Tex. 476; *Powell v. Chamberlain*, 22 Ga. 123; *Glendenning v. Andley*, 52 Ga. 347; *Wright v. Fleming*, 12 Hun (N. Y.), 469; s. c. 76 N. Y. 517; *Bell v. Romaine*, 30 N. J. Eq. 24; *New York, etc. Telephone Company v. East Orange*, 42 N. J. Eq. 490; *Windwart v. Allen*, 13 Md. 196; *Lyday v. Double*, 17 Md. 188; *Katz v. Moore*, 18 Md. 566; *Creath v. Sims*, 5 How. (U. S.) 192; *Marine Insurance Co. v. Hodgson*, 7 Cranch (U. S.), 332.

⁴ *Barker v. Elkins*, 1 Johns. Ch. (N. Y.) 465.

⁵ *Whipple v. Hutchinson*, 4 Blatchf. 190.

obey at his peril.¹ “A writ of injunction may be said to be a process capable of more modifications than any other in the law; it is so malleable that it may be moulded to suit the various circumstances and occasions presented to a court of equity. It is an instrument in its hands capable of various applications for the purpose of dispensing complete justice between the parties. It may be special, preliminary, temporary, or perpetual; and it may be dissolved, revived, continued, extended, or contracted; in short, it is adapted and used by courts of equity as a process for preventing wrong between, and preserving the rights of, parties in controversy before them.”²

¹ *Summers v. Farish*, 10 Cal. 347.

² *Tucker v. Carpenter*, Hemp. 441, per Johnson, J.; *Radford's Ex'rs v. Innes' Executrix*, 1 Hen. & Mun. 8; *Billingslea v. Gilbert*, 1 Bland, 568.

CHAPTER II.

TO RESTRAIN ACTIONS AT LAW.

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| <p>§ 36. Early Opposition to the Jurisdiction.</p> <p>37. Importance of Governing Principles and Established Limitations.</p> <p>38. True Bases of the Jurisdiction.</p> <p>39. Control of Parties, not of Courts.</p> <p>40. Operates differently from Writ of Prohibition.</p> <p>41. Jurisdiction to give Full Relief not disturbed.</p> <p>42. Existence of Defence at Law.</p> <p>43. When Courts of Law and of Equity have Concurrent Jurisdiction.</p> <p>44. Effect of Practice Acts and Codes of Civil Procedure to limit Jurisdiction.</p> <p>45. Remedy by Action at Law.</p> <p>46. Remedy by Appeal or Writ of Error as a Bar.</p> <p>47. When issued by Court to protect its own Jurisdiction.</p> <p>48. Same Subject — Interpleader.</p> <p>49. Injunction against Parties to Actions in Foreign Courts.</p> <p>50. Same Subject — Further Illustrations.</p> <p>51. Conflict of Jurisdiction between State and Federal Courts.</p> <p>52. Injunction to protect Jurisdiction already acquired.</p> <p>53. Rule in Federal with Respect to State Courts.</p> <p>54. Provision of the Act of 1793.</p> <p>55. Similarity of English and American Doctrines.</p> <p>56. Complainant must be diligent in seeking Relief.</p> | <p>§ 57. And show an Equitable Right.</p> <p>58. Substantial Grounds for Apprehension must appear.</p> <p>59. To suppress Vexatious Litigation and Multiplicity of Suits.</p> <p>60. Same Subject — Illustrations.</p> <p>61. Statutory Power to bring in other Parties and consolidate Actions.</p> <p>62. To restrain Actions in Ejectment.</p> <p>63. Suits for Partition.</p> <p>64. Actions involving Mortgages.</p> <p>65. To restrain Threatened Actions on and Transfer of Voidable Notes and Bonds.</p> <p>66. Actions between Landlord and Tenant.</p> <p>67. Actions of Forcible Entry and Detainer.</p> <p>68. Actions by and against Infants.</p> <p>69. Actions on Usurious Contracts.</p> <p>70. Actions against Receivers.</p> <p>71. No Interference with Criminal Prosecutions.</p> <p>72. Attachment Proceedings.</p> <p>73. Condemnation Proceedings.</p> <p>74. To prevent Plea of Statute of Limitations — Postponement of Trial.</p> <p>75. Garnishment — Arbitration Proceedings.</p> <p>76. When Relief granted without Original Application.</p> <p>77. Court may interpose Conditions to granting Relief.</p> <p>78. Same Subject.</p> <p>79. Effect of granting and dissolving the Writ.</p> |
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§ 36. **Early Opposition to the Jurisdiction.** — One of the most important and difficult as well as interesting branches of this jurisdiction is restraint of the commencement and prosecution of actions at law. The exercise of this almost prerogative power by courts of equity aroused the opposition of the courts of com-

mon law from the earliest period of its exercise. At first, relief was usually confined to preventing plaintiff from suing out execution upon a judgment at law after it was obtained. It was insisted that courts of equity by this means encroached upon the jurisdiction of courts of common law, and destroyed their conclusiveness.

The earliest traces of the exercise of this jurisdiction are found at the commencement of the reign of Henry VII., and during the chancellorship of Sir Thomas More, who succeeded Cardinal Wolsey. During the reign of James I., the controversy between courts of law and of equity increased in violence; Lord Coke contending against, and Lord Ellesmere in favor of, the chancery jurisdiction. There being no hope of reconciliation, the matter was referred to the king, who, upon the advice and opinion of learned lawyers, gave judgment in favor of the equitable jurisdiction in such cases, since which time the jurisdiction has been well established and seldom doubted.

§ 37. **Importance of Governing Principles and Established Limitations.** — While there are several important limitations which courts of equity will not transcend, yet the instances in which they will and will not grant relief in this form against an action at law cannot be peremptorily enumerated and catalogued. So much depends upon the peculiar circumstances and equities of many of the cases presented, and upon the liberal exercise of discretion within the range of the jurisdiction not bounded and marked out by the established checks and limitations, that many apparent and a few real contradictions are found in adjudged cases. It is important therefore to thoroughly understand the leading principles governing, as well as the checks which have been generally acknowledged to exist. To these the practitioner must resort and refer for guidance when decisions cannot be reconciled.

§ 38. **True Basis of the Jurisdiction.** — The most frequent and important, if not the only, grounds for equitable interference by injunctions in actions at law are fraud, accident, and mistake. Where such an advantage will, by reason of one or all of these, be gained in a suit at law as will render it an instrument of great injustice, courts of equity will interfere by injunction to prevent results which would be against conscience to allow.¹ It fre-

¹ 2 Story's Eq. 885; Sackett v. Hillhouse, 5 Day, 551; Dale v. Roosevelt, 5 Johns. Ch. 174; Field v. Cory, 3 Halst. Ch. 574; Chicago, M. & St. P. Ry.

quently happens, in consequence of circumstances attending a person, or connected with a subject-matter of litigation of which judicial notice can only be taken in a court of equity, that one of the parties has an advantage in a proceeding in a court of ordinary jurisdiction which must make that court an instrument of injustice.¹ In other cases, the legal defence to a claim set up at law rests either absolutely or in a great degree within the knowledge of the claimant, by which means that defence could at common law only be obtained through the assistance of a court of equity. But under code systems, allowing the opposite party to be called and compelled to testify, and allowing legal and equitable defences to be joined, the latter ground of relief has here but little or no place. An additional reason for conceding this power to a court of equity exists when an action is pending

Co. v. Pullman Palace Car Co., (Cir. Ct.) 49 F. 409; *Octonto Co. v. Lundquist*, (Mich.) 77 N. W. 950; *Cantoni v. Forster*, (Super. N. Y.) 33 N. Y. S. 645; 12 Misc. Rep. 376; *Norfolk & W. R. Co. v. Perdue*, (W. Va.) 21 S. E. 755; *De Moss v. Economy Furniture & Carpet Co.*, 74 Mo. App. 117; *Farwell v. Great Western Tel. Co.*, (Ill. Sup.) 44 N. E. 891; 161 Ill. 522. The case of *Butch v. Lash*, 4 Iowa, 215, is an excellent illustration of some of the grounds of equitable interference to stay proceedings at law. In delivering the opinion, Wright, C. J., said: "To relieve against an injury resulting from accident, is a very ancient branch of equitable jurisdiction. The loss of the deed is expressly shown by the complainant's sworn bill; there is no pretence that it occurred from any negligence or misconduct on his part. The respondent had procured a conveyance from the county, which was a cloud upon complainant's title; and to avoid the effect of this loss, and to remove this cloud, he might reasonably and properly ask relief at the hands of the Chancellor. Indeed without a jurisdiction of this sort to control the proceedings, or to enjoin the judgments of parties at law, it is most obvious that equity jurisprudence, as a system of remedial justice, would be grossly inadequate to the ends of its institution. In a great variety of cases, courts of law cannot afford any redress to the party sued, although it is most manifest that he has in conscience and justice, but not at law, a perfect defence. He may be deprived of his rights by fraud, or accident, or mistake." In another case it was stated too broadly thus: "A court of equity will not interfere unless a clearly established case of fraud, accident, or mistake be shown, sufficient to deprive the person aggrieved of a defence at law." *Rogers v. Cross*, 3 Chand. 34. Mistake must be mutual. *Rommel v. Mass*, (N. J. Ch.) 32 A. 127. Where an indemnity bond had been given through mistake, the party executing it supposing he was signing a recognizance, a suit on it was enjoined. *Field v. Cory*, 3 Halst. Ch. 574.

¹ *Redes. Tr. Ch. Pl. 102*. Where defendant sold complainant's property under a deed of trust, and sued for the balance alleged to be due on the note secured by it, the chancery court had jurisdiction of a bill charging fraud in the sale, and usury in the note, and praying that the prosecution of defendant's suit be restrained. *Adams v. Ball*, (Miss.) 5 So. 109.

therein which will dispose of all the matters in controversy between the parties. When such is the case it may restrain proceedings in other courts in respect to the same subject-matter.¹

To justify the interposition of a court of equity on behalf of a defendant being proceeded against in a court of law, the controversy must involve some equitable right, interest, or estate, so that a full and complete determination of the matters in issue cannot be had at law. But this rule does not apply where the subject-matter is within the jurisdiction of the court. In such cases objections to jurisdiction over the parties must be made at the earliest opportunity, otherwise they will be waived.²

The relief will generally be granted to a defendant possessing an equitable title of which he cannot avail himself by way of defence at law.³ And so where complainant is entitled to the benefit of an equitable estoppel of which he cannot avail himself by way of defence at law, equity will interpose by injunction

¹ *Bank v. R. & B. R. Co.*, 28 Vt. 470; *Vermont, etc. R. Co. v. Vermont, etc. R. Co.*, 46 Vt. 792; *Pearce v. Olney*, 20 Conn. 543; *Hays v. Ward*, 4 Johns. (N. Y.) Ch. 123; *Keyser v. Rice*, 47 Md. 203; *Snook v. Snetzer*, 25 Ohio St. 516; *Engel v. Scheuerman*, 40 Ga. 206; *Vail v. Knapp*, 49 Barb. (N. Y.) 299; *Field v. Holbrook*, 3 Abb. Pr. (N. Y.) 377; *Thompson v. Norris*, 11 Abb. (N. Y.) N. Cas. 163; s. c. 63 How. (N. Y.) Pr. 424; *Dehon v. Foster*, 4 Allen (Mass.), 545; s. c. 7 Allen, 57.

² *Nicholson v. Pim*, 5 Ohio St. 25; *Ludlow v. Simond*, 2 Cai. Cas. (N. Y.) 1; *Burden v. Stein*, 27 Ala. 104; *Sedam v. Williams*, 4 McLean (U. S.), 51; *Russ v. Wilson*, 22 Me. 207; *New York v. Mapes*, 6 Johns. Ch. (N. Y.) 46; *Waterbury v. Dry Dock, etc. R. Co.*, 54 Barb. (N. Y.) 388; s. c. 32 How. (N. Y.) Pr. 193; *People v. Harlem Bridge Co.*, 1 Abb. (N. Y.) Pr. n. s. 169; *Fuller v. Melrose*, 1 Allen (Mass.), 166; *Pillow v. Thompson*, 20 Tex. 206; *Callaway v. Alexander*, 8 Leigh (Va.), 114; *Gravesend v. Hoffmann*, 1 Abb. L. J. 99; *Muir v. Howell*, 37 N. J. Eq. 89; *Water Lot Co. v. Bucks*, 5 Ga. 815; *Grey v. Ohio, etc. R. Co.*, 1 Grant (Pa.) Cas. 412. A decree enjoining the enforcement of a judgment as a cloud upon the plaintiff's title to land is void where the court has no jurisdiction of the person of the judgment creditor, and the petition fails to allege that the judgment is a lien on any specific estate of the plaintiff in land within the jurisdiction of the court. *Cobbey v. Wright*, 29 Neb. 274; 45 N. W. 460.

³ *Saeger v. Cooley*, 44 Mich. 14. But the party seeking this equitable remedy must show a superior equity in his favor; for if the equities of plaintiff and defendant are equal the court will decline to interfere. *McFarlane v. Griffith*, 4 Wash. C. C. 585. Where without fault on his part an administrator was prevented from pleading *plene administravit*, an injunction was granted to restrain an action upon his bond to recover an indebtedness. *Glendening v. Ansley*, 52 Ga. 347. So an injunction was granted to restrain an action upon a foreign judgment which had been fraudulently obtained. *Staunton v. Embry*, 46 Conn. 595.

against a suit at law, — as where the plaintiff had previously to bringing his action on an alleged indebtedness represented that no such indebtedness existed.¹ But a suit upon a note given at a time when the maker was insolvent will not be enjoined for the protection of other creditors of the maker, since such note, having been given for a *bona fide* indebtedness, is not invalidated or rendered fraudulent by reason of such insolvency.² An excellent illustration of the checks upon the exercise of the jurisdiction under consideration was afforded in a case where a bill was filed to enjoin an action at law, because: 1. The action was on a judgment which had been satisfied. 2. The judgment creditor was guilty of laches in delaying to bring his action. 3. The action was maliciously brought to harass and oppress. On demurrer to the bill it was held that the demurrer should be sustained. As to the first allegation of the bill, the remedy at law was complete. As to the second, equity will not enjoin an action at law because delayed, if brought within the statutory period of limitation. As to the third, equity will not enjoin the prosecution of legal rights because the prosecutor's motives are malicious.³ And where both parties to an action at law are content with the jurisdiction, and desire the action to proceed, a court of equity will not enjoin it at the instance of third persons, without very imperative reasons.⁴ But, in a proper case for equitable interference, if B. owes A., and B. is prosecuting a suit against C., although A. cannot by injunction interfere with the progress of the suit, he may have an order inhibiting the pay-

¹ *Neville v. Wilkinson*, 1 Bro. P. C. 543; *Money v. Jordan*, 2 De Gex, M. & G. 318. So if A., in disregard of an agreement to execute certain releases, sues B. on the claim to be released, B. may maintain a bill for an injunction and for specific performance. *Baker v. Hawkins*, 14 R. I. 359. Where plaintiff, having contracted to build a bridge for stock in the bridge company, procured defendant, in consideration of an assignment or pledge of the stock, to furnish funds to carry on the work, and defendant failed to furnish the amount agreed, so that plaintiff was obliged to sell stock at a loss, plaintiff, having sued defendant for damages, making the bridge company a party, may have the prosecution of a suit by defendant against the bridge company, to recover a part of stock restrained, though he was not a party to that suit, the bridge company having approved the assignment to defendant. *Appeal of McDowell*, 123 Pa. St. 381; 16 A. 753; *Appeal of Hutchinson*, (Pa.) 16 A. 761.

² *Savage v. Ball*, 2 C. E. Green, 142.

³ *Clark v. Clapp*, 14 R. I. 248.

⁴ *Smith v. Cuyler*, 78 Ga. 654; 3 S. E. 406.

ment by C. to B. of the judgment, when recovered. and inhibiting its transfer by B.¹

§ 39. **Control of Parties, not of Courts.** — It would be repugnant to the idea of the supremacy of each judge in his own sphere to allow an injunction or other process to run against or control a judge acting within the scope of his jurisdiction. It is therefore a fundamental principle that if the court in which an action is pending has jurisdiction of the subject and the parties, the judgment will not be held void because of an injunction restraining the prosecution of the cause. This is especially true in those states where actions at law and those prosecuted for equitable relief may be brought and decided in the same tribunal. In a New York case it was held that a judge holding a law court was not divested of his jurisdiction to proceed with actions pending therein because another judge of the same court had enjoined the proceedings at law.² Therefore, since the constitution guarantees to every person the right to seek redress through the courts for any injury to his person or property, or to enforce any legal demand therein, a court is without power to prevent, by an injunction, a person from bringing a suit before another court of competent jurisdiction to enforce a right claimed or redress a grievance;³ and while a court issuing an injunction against a party is without power to prevent the court wherein he is litigating his legal rights from proceeding to judgment, yet the former court may punish the party for contempt in disobeying its process.

§ 40. **Operates differently from Writ of Prohibition.** — The writ which issues in these cases has been frequently stated to be in the nature of a prohibition; but it differs so essentially from it that there seems considerable impropriety in the comparison. A prohibition is a remedy against an encroachment of jurisdiction, issued only from a superior court, is granted on the suggestion that the court to which it is directed has not the legal cognizance of the cause, and it is directed to the judge of the inferior court, as well as to the parties in the cause. An injunction, on the other hand, where its object is to restrain proceedings in another court, is directed only to the parties. It neither assumes any superi-

¹ Wells v. Collins, 11 Lea (Tenn.), 213.

² Platt v. Woodruff, 61 N. Y. 378.

³ State v. Rightor, 39 La. An. 619; 2 So. 385.

ority over the court in which they are proceeding, nor denies its jurisdiction, but is granted on the sole ground that from certain equitable circumstances, of which the court that issues it has cognizance, it is against conscience for the party to proceed in the cause.¹

§ 41. **Jurisdiction to give Full Relief not disturbed.** — Where courts of law and equity possess concurrent jurisdiction over the subject in controversy the latter will not interfere by injunction with an action already brought and pending in the court of law, no obstacle existing to obtain complete relief in the action.²

¹ Justice Story says: "A writ of injunction is in no just sense a prohibition to the courts of common law, in the exercise of their jurisdiction. It is not addressed to those courts. It does not even affect to interfere with them. The process, when its object is to restrain proceedings at law, is directed only to the parties. It neither assumes any superiority over the court in which those proceedings are had, nor denies its jurisdiction. It is granted on the sole ground that from certain equitable circumstances, of which the court of equity granting the process has cognizance, it is against conscience that the party inhibited should proceed in the cause. The object therefore really is to prevent an unfair use being made of the process of a court of law, in order to deprive another party of his just rights, or to subject him to some unjust vexation or injury, which is wholly irremediable by a court of law. One of the plainest cases which can be put of the propriety of granting an injunction to a judgment at law, is, where it has been in fact satisfied, and yet the judgment creditor attempts to set it up, and enforce it, either against the judgment debtor, or against some person claiming under him, who is thereby injured in his property or rights. In such cases, a court of law would often be exceedingly embarrassed in giving the proper redress if it could give it at all. But courts of equity deal with it at once, and apply the most complete remedial relief."

² Story's Eq. Jurisprudence, sec. 875 *et seq.* See also *Daniels v. Lazarus*, (C. C.) 65 F. 718; *Kempson v. Kempson*, (N. J.) 43 A. 97; *Alleghany & K. R. Co. v. Weidenfeld*, (Sup.) 25 N. Y. S. 71; 5 Misc. Rep. 43; *Allen v. Buchanan*, 97 Ala. 399. But control of parties will not be extended so as to interfere with internal management of foreign assessment associations. *Taylor v. Mutual Reserve Fund Life Ass'n of New York*, (Va.) 33 S. E. 385. Nor can one be enjoined from applying to a court for an injunction. *Balogh v. Lyman* 89 N. Y. S. 780; 6 App. Div. 271.

² *Southampton D. Co. v. Southampton Board*, 11 Eq. Cas. 252; *Womack v. Powers*, 50 Ala. 5; *Murphree v. Bishop*, 79 Ala. 404; *Collier v. Falk*, 66 Ala. 223; *N. East. R. Co. v. Barrett*, 65 Ga. 601; *Baxter v. Baxter*, 77 N. Car. 118; *Parker v. Bledsoe*, 87 N. Car. 221; *Welde v. Scotten*, 59 Md. 72; *Ferguson v. Herring*, 49 Tex. 126; *Palmer v. Gardiner*, 77 Ill. 143; *Baker v. Rinehard*, 11 W. Va. 238; *Lansing v. Eddy*, 1 Johns. Ch. (N. Y.) 49; *Foster v. Wood*, 6 Johns. Ch. (N. Y.) 87; *Cohen v. L'Engle*, (Fla.) 11 So. 47; *Wyeth Hardware & Manuf'g Co. v. Lang*, 54 Mo. App. 147; *Cheney v. Schuyler*, (Sup.) 20 N. Y. S. 546; 65 Hun, 626; *Commercial Bank v. Cabell*, 96 Va. 552; *Pond v. Harwood*, 34 N. E. 768; 139 N. Y. 111; *St. Johns Nat. Bank v. Bingham Tp.*, 113 Mich. 203; *Conant v. Wright*, 48 N. Y. S. 422; 22 App. Div. 216;

So where a court of equity has itself no power to grant administration, it will not enjoin the taking out of letters of administration in a probate court having jurisdiction to determine the controversy concerning the right to administer the estate.¹ This rule applies especially to cases pending in tribunals of special and limited jurisdiction created for special and particular purposes, and possessing peculiar or limited powers.²

On the other hand, where a court of equity has already acquired jurisdiction of a subject of litigation, and has ample

Teft v. Booth, 104 Ga. 59; *Chesapeake Guano Co. v. Montgomery*, 116 Ala. 384; *Harkrader v. Wadley*, 19 S. Ct. 119; 172 U. S. 148; *Baker v. Baker*, 57 N. Y. S. 281; 39 App. Div. 629. See also *Morgan v. Morgan's Admr.*, 50 Ala. 89, where an injunction was refused to enjoin proceedings in a probate court, where the court had refused an application for a new trial. In *Kinney v. Redden*, 2 Del. Ch. 44, an injunction was refused to enjoin a court of probate from making a disposition of lands according to a decree which it had made against a party possessing the right of appeal from the decree.

¹ *Wilcocks v. Carter*, L. R. 10 Ch. 440. See also *Wright v. Fleming*, 76 N. Y. 517. *Wills*. — The surrogate having exclusive jurisdiction, under Code Civ. Proc. N. Y. 2472 *et seq.*, to admit wills to probate, and to revoke probate thereof, an action cannot be maintained to restrain defendant from proceeding before the surrogate to revoke probate of a will, and to admit to probate a later will, on the ground that the limited powers of the surrogate preclude him from considering the question whether defendant is estopped by having received benefits under the first will. *Paxton v. Brogan*, 10 N. Y. S. 303. *Action for dower*. — Upon a bill to restrain defendant from prosecuting her action at law for dower, it appeared that the full court, since the filing of the bill, had sustained the ruling of the presiding justice in the action at law; holding that complainant's evidence, giving it the most favorable construction possible, did not constitute a defence to the action. *Held*, that the bill should be dismissed. *Alley v. Chase*, 83 Me. 537; 22 A. 393; *Jordan v. Same*, 83 Me. 540; 22 A. 394.

² *Morgan v. Morgan's Admr.*, 50 Ala. 89; *Perault v. Rand*, 10 Hun, 222; *Johnston v. Young*, L. R. 10 Eq. 403; *Kinney v. Redden*, 2 Del. Ch. 44; *Wilson v. Alleghany Co.*, (N. C.) 32 S. E. 326; *McMahon v. Weart*, (N. J. Ch.) 35 A. 444. An injunction "will not lie to restrain a justice of the peace from adjudicating causes arising under a statute on the ground that the statute is violative of the Constitution." *Jones v. Stallworth*, 55 Tex. 138. On the same principle a court of equity refused to interfere with the action of a court-martial invested by the laws of the state with jurisdiction over military offences. *Perault v. Rand*, 10 Hun, 222. But since in England trusts are properly cognizable only in equity, a court of chancery there will enjoin a suit in the ecclesiastical court upon a legacy, notwithstanding the original jurisdiction of the latter in such matters upon a bill brought by an executor in trust. *Anon.*, 1 Ak. 491. So where during the proceedings in a court of admiralty jurisdiction, new evidence was discovered at a stage when by the rules of such court no new evidence could be received, an injunction was granted to stay the proceedings. *Jarvis v. Chandler*, Turn. & R. 319.

power to afford relief, it will not allow a party to such litigation to transfer it to another forum, and will by injunction prevent him from doing so by the commencement of a proceeding at law concerning the same subject-matter.¹ There is undoubted propriety in confining litigation to the court first obtaining jurisdiction of the same, and an injunction is often granted to prevent either party from removing the litigation into another court.² And the fact that the court subsequently acquiring jurisdiction of the subject-matter, and in which the proceedings are sought to be enjoined, has equitable as well as common-law powers, does not affect the application of the rule.³

¹ See *Whitley v. Dunham Lumber Co.*, 7 So. 810; 89 Ala. 498; *New Jersey Z. Co. v. Franklin Iron Co.*, 29 N. J. Eq. 422, where the controversy had been fully heard, and only awaited an adjudication upon the evidence. See also *Dyckman v. Kernochan*, 2 Paige, 26; *Ellsworth v. Cook*, 8 Paige, 643; *Davis v. Wakelee*, 15 S. Ct. 555; 156 U. S. 680; *Brown v. Brown*, 66 Vt. 76, 81; *Hackettstown Nat. Bank v. Ming*, 52 N. J. Eq. 156. An injunction was granted restraining a party from proceeding at law to recover damages for breach of a contract to convey land, pending an action in equity for specific performance. *Blakeney v. Hardie*, L. R. 7 Eq. 472. For an early recognition of this principle in England, see *Stephenson v. Gardiner*, 2 P. Wms. 286, where the court of chancery refused to enjoin a proceeding in the spiritual court to set aside a will of personalty for fraud. Rule under discussion applied where the suits had been brought against defendants for violations of village ordinances against the sale of intoxicating liquors, *Yates v. Village of Battavia*, 79 Ill. 500; to application for injunction to restrain proceeding in *mandamus*. *People v. Wasson*, 64 N. Y. 167.

² *Conover v. Mayor*, 25 Barb. 531; *Crane v. Bunnell*, 10 Paige, 333; *Horn v. Kilkenny R. Co.*, 1 K. & J. 399; *Pine v. Shannon*, 32 N. J. Eq. 85; *Farmers' Loan & Trust Co. v. McHenry*, 9 Abb. (N. Y.) N. Cas. 235. An independent suit to enjoin the prosecution of an action pending an appeal in another proceeding is improper, where a stay could have been had on application to the court. *Hayward v. Hood*, 39 Hun (N. Y.), 596. It is no objection that in suits brought on similar demands judgment had been uniformly rendered against plaintiff. *Galveston H. & S. A. Ry. Co. v. Dowe*, 70 Tex. 5; 7 S. W. 368. *In actions concerning real estate.*—Injunction refused where sought in an ejectment suit, deed upon which plaintiff relied being void. *Morris C. & B. Co. v. Jersey City*, 1 Beas. 227. If, after a preliminary injunction is granted, it appears that as to a portion of the land concerning which the action restrained was brought, it can be properly tried in a legal form, the injunction will be dissolved as to such portion. See *Camden & A. R. Co. v. Stewart*, 3 C. E. Green, 489, holding that before equity will restrain an action concerning real estate the right to have an injunction must be clear. Otherwise the salutary rule applies that when there are two courts of co-ordinate jurisdiction that in which an action is first brought will not be interfered with unless great injustice and hardship would otherwise result.

³ *Conover v. Mayor*, 25 Barb. 531. *Settlement of accounts.*—If a court of law has taken jurisdiction of a legal claim and the defendant sets up a claim

Any other rule would necessarily lead to great abuse, and render courts of equity instruments of injustice.¹

To justify interposition by courts of equity possessing concurrent jurisdiction in proceedings at law, it is requisite that such court should have power to give a more perfect remedy, or that the case can be better tried by its procedure.² But where a court of equity has acquired jurisdiction for one purpose it may retain the cause, and administer full relief.³

§ 42. **Existence of Defence at Law.** — It may be stated as a rule of universal application that legal proceedings will not be enjoined upon grounds of which a party may avail himself in defence of the action.⁴ It is no ground for the relief under this

for a balance which he alleges is due him from the plaintiff "on the settlement of accounts," which can only be settled in a court of equity as a partnership account or the account of a personal representative of a decedent, a court of equity will not generally suspend the course of legal proceedings by injunction for the purpose of enabling the defendant in the common-law suit to have these accounts settled in equity, and the balance, which he claims, ascertained and allowed as an offset against the plaintiff's demand in a suit at law. The defendant in such a case has his remedy by an independent suit in equity to establish his claim, and may then set off the judgment. *Miller v. Miller*, 25 W. Va. 495; *Preston v. Stratton et al.*, executors of Stratton, 1 Anst. 50; *Robinson v. Wheeler*, 51 N. H. 384; *Cummings v. Morris*, 25 N. Y. 625; *Ranson v. Samuel*, 1 Craig & Ph. 171; *Duncan v. Lyon*, 3 Johns. (N. Y.) Ch. 351; *Mead v. Merritt*, 2 Paige (N. Y.), 403; *Hewitt v. Kuhl*, 10 C. E. Green (N. J.), 24. The prosecution of a suit in one court cannot be enjoined by another court of co-ordinate jurisdiction in California. *Wilson v. Baker*, 64 Cal. 475; 2 P. 253.

¹ *Crane v. Bunnell*, 10 Paige, 383.

² *Ochsenbein v. Papelier*, L. R. 8 Ch. App. 695; *Hoare v. Bremridge* L. R. 14 Eq. 522.

³ *Hayes v. Hayes*, 2 Del. Ch. 191; *Oliver v. Pray*, 4 Ohio, 175; *Fithian v. Corwin*, 17 Ohio St. 118; *West Point Iron Co. v. Reymert*, 45 N. Y. 708; *Crane v. McCoy*, 1 Bond (U. S.), 422.

⁴ *Hardy v. First Nat. Bank*, 46 Kan. 88; 26 P. 423; *Bostwick v. Covell* 24 Fed. Rep. 402; *Northern Pac. R. Co. v. Cannon*, (Cir. Ct.) 49 F. 517; *New York D. D. Co. v. American L. I. & T. Co.*, 11 Paige, 384; *Peninsular Construction Co. v. Merritt*, (Md.) 45 A. 172; *Beauchamp v. Putnam*, 34 Ill. 378; *Drexel v. Berner*, 16 Fed. Rep. 522; s. c. 14 Fed. Rep. 268; *Smith v. Short*, 11 Iowa, 523; *Payson v. Lamsin*, 134 Mass. 593; *Powell v. Chamberlain*, 22 Ga. 123; *Elder v. Shaw*, 12 Nev. 78; *Martin v. Orr*, 96 Ind. 27; *Sarber v. Rankin*, 154 Ind. 236; *Palmer v. Hayes*, 93 Ind. 189; *Gibson v. Moore*, 22 Texas, 611; *Miller v. Miller*, 25 W. Va. 495; *Hewitt v. Kuhl*, 10 C. E. Green, 24; *Clarke v. Clapp*, 14 R. I. 248; *Hardinge v. Webster*, 1 Drew. & Sm. 101; *Pardridge v. Brennan*, 64 Mich. 575; 31 N. W. 524; *De Worms v. Mellier*, L. R. 16 Eq. 554; *North Eastern R. R. Co. v. Barrett*, 65 Ga. 601; *Olmsted's Appeal*, 86 Pa. St. 284; *Heath v. Heath*, 9 Ir. Eq. 635; *New Orleans*, etc.

head that the action is groundless or frivolous.¹ But the rule that equity will withhold relief by injunction to restrain the

Co. v. Lowenstein, (Miss.) 11 So. 187; *Bullitt's Ex'rs v. Songster's Adm'rs*, 3 Munf. 55; *Evans v. Taylor*, 28 W. Va. 184; *Pullman P. C. Co. v. Central T. Co.*, 34 Fed. Rep. 357; *Sweeney v. Williams*, 36 N. J. Eq. 459; *Jacobson v. Metzgar*, 43 Mich. 403; *Rucker v. Morgan*, (Ala.) 25 So. 242; *Saucier v. Rouse*, (Miss.) 12 So. 481; *City of Worcester v. Lakeside Mfg. Co.*, 174 Mass. 299; 54 N. E. 838; *Deweese v. Reinhard*, 17 S. Ct. 340; 165 U. S. 386; 41 L. Ed. 757; *New York City Baptist Mission Soc. v. Potter*, 44 N. Y. S. 1051; 20 Misc. Rep. 191; *Burton v. Willen*, 33 A. 675; 6 Del. Ch. 403; *Cook County v. City of Chicago*, (Ill. Sup.) 42 N. E. 67; 158 Ill. 524; *Bomeisler v. Forster*, (Sup.) 41 N. Y. S. 742; 10 App. Div. 43; *Mountain Lake Park Ass'n of Garrett County v. Shartzer*, (Md.) 34 A. 536; *Saunders v. Huntington*, (Mass.) 44 N. E. 127; *Chicago, B. & Q. R. Co. v. City of Ottawa*, (Ill. Sup.) 36 N. E. 85; 148 Ill. 897; *Wolf River Lumber Co. v. Brown*, (Wis.) 60 N. W. 996; 88 Wis. 638; *Hawkinberry v. Snodgrass*, 39 W. Va. 332; *Beer v. Landman*, 88 Tex. 450; *Home Life Ins. Co. v. Selig*, 81 Md. 200. *Illustrations.*—A party having a good defence at law upon securities, *New York D. D. Co. v. American L. I. & T. Co.*, 11 Paige, 384; holding also that the neglect of a defendant in a chancery suit to object to the court will not entitle plaintiff to an injunction restraining a suit at law. See also *Chase's Ex'r v. Chase*, (N. J. Ch.) 24 A. 914. Want of jurisdiction in the court of law is available there, and does not entitle a complainant to an injunction, *Gibson v. Moore*, 22 Tex. 611; *Dubuque, etc. R. Co. v. Cedar Falls, etc. R. Co.*, 76 Iowa, 702; *Jones v. Stallworth*, 55 Tex. 138; nor that a policy of insurance the basis of the action was obtained through fraudulent representations by the insured. *Life Ass'n v. McBlain*, L. R. 9 Eq. 176. General rule applied to application of a garnishee to have proceedings restrained. *Carr v. Lee*, 44 Ga. 376. The fact that a claim of title is stale or that it is barred by the statute of limitations does not alone warrant an injunction restraining an action based upon it, since a court of law furnishes ample opportunity for defence. *Horner v. Jobs*, 2 Beas. 19. See also *Hutaff v. Adrian*, (N. C.) 17 S. E. 78. A prosecution for violating a municipal ordinance will not be restrained because of the illegality of the ordinance, since that fact is available as a defence to the prosecution. *City of Denver v. Beede*, (Colo.) 54 P. 624. Where there is a legal defence to a suit, equity will not interfere simply because the only witness therefor might deny it, and could not be impeached by defendant as being his witness. *Matthews v. Dodd*, 3 Del. Ch. 159. An injunction will not issue to enjoin proceedings in the probate court for the recovery of a pecuniary legacy, on the ground that the executor tendered the money to the legatee, who refused to receive it, and that he was afterwards robbed, without fault on his part, of the identical money tendered, which he had kept apart, as the probate court is competent to decide on this defence. *Newsom v. Thornton*, 66 Ala. 311. An injunction will not be issued to restrain a justice of the peace from acting under a statute, on the ground that it is unconstitutional. *Jones v. Stallworth*, 55 Tex. 138. A misrepresentation as to the price for which the contractor had done similar work for third persons may be set up as a defence to the legal action, and therefore equity will not restrain its prosecution. *Roemer v.*

¹ *Kemp v. Tucker*, L. R. 8 Ch. App. 369.

proceedings at law where the party applying for it ought to obtain relief from the court having jurisdiction of such action, does not apply where such court is one of another state, for the reason that a remedy at law which will bar relief in equity must be one which the courts of the same state can apply, and not one which must be sought in the courts of another state.

Although the English court of chancery formerly gave effect to a different rule, courts of equity of this country at present refuse to interfere in actions upon penal bonds where the only question is as to whether the amount is to be considered as a penalty or only to cover the amount to be assessed as damages. Lord Thurlow granted an injunction upon grounds of public policy, and afterwards made it perpetual, restraining an action upon a bond given for the purchase of an office.¹ But under a statute providing that before final orders summary proceedings shall not be stayed by any court or judge, except in a case where an injunction would be granted to stay the proceedings, in an action of ejectment, injunction should not be granted on the ground that the petition was not properly verified, or did not describe the premises, or did not state the interest of the petitioner, or that the defence of another action pending was not allowed, as all these are legal defences, available on the trial, and reviewable on appeal.² A complaint for an injunction is not, however, open to demurrer on the ground that the complainants may maintain their defence in the action at law, where it appears that in the action at law the complainants' right to prove the facts upon which the estoppel rests may be denied on the ground that the plaintiff in the action at law is not bound as executrix for what she did and assented to in her.

Conlon, 45 N. J. Eq. 234; 19 A. 664. Action on a bond will not be enjoined because it was obtained by fraud, that being a defence at law. *Dorsey v. Monnett*, (Md.) 20 A. 196. But in *Hastings v. Belden*, 55 Vt. 273, it was held that defendant could not insist that complainant had an adequate defence to the suit at law, namely, the statute of limitations; that defendant could not oblige plaintiff to avail himself of that defence. Compare *Thorndike v. Thorndike*, 142 Ill. 450. Remedy by objection in condemnation proceedings, see *Dierks v. Commissioners*, (Ill. Sup.) 31 N. E. 496. See also *Chicago, R. I. & P. R. Co. v. City of Chicago*, (Ill. Sup.) 32 N. E. 178.

¹ *Harrington v. Duchatel*, 1 Bro. P. C. 125. See also *Harrington v. Chastel*, Dick. 581; *Sloman v. Walter*, 1 Bro. C. C. 418; *Errington v. Aynesley*, 2 Bro. P. C. 341.

² *Bliss v. Murray*, 7 N. Y. S. 917; N. Y. C. C. P. sec. 2265.

character as widow and legatee.¹ And where plaintiff has sued in a justice court which has complete jurisdiction of his case, but has not jurisdiction sufficiently broad to enable it to entertain defendant's counter-claim, which grows out of the same transaction, and involves the same precise issue, so that the determination of plaintiff's case could be pleaded as a bar to defendant's, defendant can enjoin further proceedings, and have the case determined in a court having jurisdiction of the whole controversy.²

Under the code system, where defendant may set up all the defences, legal or equitable, which he may have to an action, he cannot maintain a separate action, based on an equitable defence, to enjoin the first action.³

§ 43. **When Courts of Law and of Equity have Concurrent Jurisdiction.** — A parallel case with the existence of a defence at law, and one often identified with it, is where the court to which application for an injunction is made and that in which the party sought to be enjoined is proceeding, have concurrent and ample jurisdiction to grant any relief to which the parties are entitled. An injunction will not be granted to restrain proceedings at law, unless an injunction can afford more perfect relief, or unless from the nature of the case a court of equity is a more convenient tribunal for the trial than one of law. Thus an action at law upon a foreign judgment will not be enjoined upon the ground of fraud in obtaining it, unless the question of fraud can be better tried in equity than at law.⁴ The rule is applied where the defensive matter relied upon con-

¹ *Drexel v. Berney*, 122 U. S. 241; 7 S. Ct. 1200.

² *Gregory v. Diggs*, (Cal.) 45 P. 261.

³ *Richardson v. Davidson*, 5 N. Y. S. 617. Plaintiff sought to restrain the collection of claims against it on policies of insurance assigned to defendant by the former holders thereof, who had surrendered the policies for their cash value as estimated by plaintiff, and had given receipts in full discharge of all claims. Defendant alleged that the surrender of the policies and the receipts had been fraudulently obtained. *Held*, that plaintiff was not entitled to an injunction. *Metropolitan Life Ins. Co. v. Fuller*, (Conn.) 23 A. 193.

⁴ *Ochsenbein v. Papelier*, L. R. 8 Ch. App. 695; *Hoare v. Bremridge*, L. R. 8 Ch. App. 22; *Evans v. Taylor*, 28 W. Va. 184; *Chicago City Ry. Co. v. General Electric Co.*, 74 Ill. App. 465. A suit in equity will not lie to restrain the execution of a writ of assistance issued in another suit in equity, whether the second suit is brought in the same or in a different court, by a party or by a stranger to the first suit. *Platto v. Deuster*, 22 Wis. 482, followed; *Endter v. Lennon*, 46 Wis. 299; 50 N. W. 194.

sists of a set-off where the rule of set-off is the same in equity and at law.¹

§ 44. **Effect of Practice Acts and Codes of Civil Procedure to limit Jurisdiction.** — An injunction will not be granted to restrain a suit in equity to which a party has an equitable defence, for the reason that such defence may be as effectually passed upon in the action as in the injunction proceeding.² This being the case, the adoption of codes of civil procedure has an important bearing upon jurisdiction to restrain proceedings at law. New York and many other states have adopted code systems which unite the jurisdiction of law and equity in the same tribunals, clothing them with common-law jurisdiction, and permitting an equitable defence to an action at law. A majority of the states and territories have adopted this system, and a system very similar in its main features became a law in England in 1854, — seven years after the first resort to the plan in the state of New York. The code recognized the partition of legal and equitable jurisdiction, and at the same time greatly enlarged the equity powers of the law side of the courts by permitting a defendant to interpose an equitable defence to a legal action. This defence in some of the code states may not only bar the plaintiff's cause of action, but will entitle the defendant to affirmative relief.

¹ *Hayes, Admr. v. Hayes*, 2 Del. Ch. 191. Applied to cross demands arising from unsettled accounts between the parties. *Hewitt v. Kuhl*, 10 C. E. Green, 24. See also *Rawson v. Samuel*, 1 Cr. & Ph. 161. Compare *Clark v. Cort*, 1 Cr. & Ph. 154. The fact that the applicant fears he will not obtain complete justice at law, or thinks he should have been sued in a court of higher jurisdiction, does not warrant a departure from the rule denying relief where a court of law may afford the relief to which a defendant seeking an injunction to restrain proceedings at law is entitled. *Butchers' Benev. Ass'n v. Cutler*, 26 La. An. 500.

² *Hall v. Fisher*, 1 Barb. Ch. R. 53. A mortgagee of a stock of goods which by agreement had been intermingled and confused with after-acquired goods, as to which latter he never had actual possession and only an equitable title, brought an action of detinue, and seized all the goods, and while that action was pending filed a bill in equity to foreclose the mortgage, alleging his inability to distinguish the original stock of goods from those after-acquired; that the defendant, the mortgagor, possessed and withheld the only evidence by which they can be distinguished; and praying that the defendant be enjoined from setting up, as a defence in the detinue suit, that the mortgagee had not the legal title to all the goods. *Held*, that a court of equity would not interfere to restrain such legal defence to the action at law. *Tyson v. Weber*, 81 Ala. 470; 2 So. 901.

In most of the code states an equitable defence to a civil action is now as available as a legal defence. The only question now is, Ought the plaintiff to recover? And anything which shows that he ought not is available to the defendant, whether it was formerly of equitable or legal cognizance.¹ Accordingly the supreme court of Florida, whose jurisdiction in equity causes is simply appellate, would not issue a temporary injunction, pending the appeal in a cause before it, on appeal from an order of the circuit court, denying the injunction asked for, where it was sought to restrain a suit at law, the ground for its refusal being that the facts on which it was asked constituted a good defence by an equitable plea to the legal suit.² But the federal courts, not being influenced by state practice acts, still exercise undiminished jurisdiction, as at common law. So where an action of law had been brought in the circuit court, in which the defence was purely equitable, and a suit in equity had been brought for relief against said action, it was held that the court would enjoin said action until the suit had been decided.³

§ 45. **Remedy by Action at Law.** — It may happen that although the matter upon which the application for an injunction is based be not available as a defence at law, yet the defendant can obtain full relief by a separate action. Where such is the case an injunction should be refused.⁴ For instance, equity will not restrain the prosecution of an action at law for the breach of covenants of seisin and quiet enjoyment, on the ground that the

¹ *Dobson v. Pearce*, 12 N. Y. 156, 168; *Chase v. Peck*, 21 N. Y. 581; *Wisner v. Ocumpaugh*, 71 N. Y. 113, 117; *Maxwell v. Campbell*, 45 Ind. 360; *Holland v. Johnson*, 51 Ind. 346; *Hammond v. Perry*, 38 Iowa, 217; *Carpenter v. Oakland*, 30 Cal. 439; *Cannon v. Johnson*, 20 Mo. 108; *Kennedy v. Daniels*, 20 Mo. 104; *Hubble v. Vaughn*, 42 Mo. 138; *Harrington v. Fortner*, 58 Mo. 468; *Ballinger v. Lantier*, 15 Kan. 608; *Struman v. Robb*, 37 Iowa, 311; *N. Eastern R. Co. v. Barrett*, 65 Ga. 601. Defendant having answered the complaint in the first action, it is immaterial whether or not under the issue thus made the equitable defence sought to be enforced by injunction can be determined. It is defendant's own fault if his pleading does not cover his case. *Richardson v. Davidson*, 5 N. Y. S. 617.

² *Cohen v. L'Engle*, 24 Fla. 542; 5 So. 235.

³ *Crelin v. Ely*, 7 Sawyer C. Ct. 532.

⁴ *Iowa & C. Land Co. v. Temescal Water Co.*, 95 F. 820; *Birmingham Railway & Electric Co. v. Birmingham Traction Co.*, (Ala.) 25 So. 777; *Pennsylvania Co. v. City of Chicago*, 181 Ill. 289; 54 N. E. 825; *Zanhizer v. Hebner*, (W. Va.) 35 S. E. 4; *Cruickshank v. Bidwell*, 176 U. S. 73; 20 S. Ct. 280.

covenantee, at the time he took the deed, knew that the grantors had no title, and concealed such knowledge from them; and the fact that one of the grantors has become insolvent since the execution of the deed, and that complainant must pay the entire damages for the breach, is immaterial.¹ On the same principle a court of equity will not entertain a suit to enjoin common-law proceedings which are void for want of jurisdiction in the common-law tribunal before which they are being prosecuted, the injured party having an adequate remedy at law, in trespass against the wrong-doer.² So a bill by sureties on an administrator's bond to enjoin collection of decrees in probate court which had been satisfied, was held to be without equity, there being a plain and adequate remedy by supersedeas.³ And an injunction was refused to restrain an action by heirs to recover the possession of premises from a devisee under a last will which had been insufficiently proven. The proper remedy was considered to be for the complainant to retrace his steps and correct the errors in the probate proceeding.⁴

§ 46. **Remedy by Appeal or Writ of Error as a Bar.** — The existence of a right to an appeal is usually sufficient ground for refusing an injunction against proceedings at law.⁵ So held

¹ *Sparrow v. Smith*, 68 Mich. 209; 29 N. W. 691.

² *St. Louis, I. M. & S. R. Co. v. Reynolds*, 89 Mo. 146; 1 S. W. 208. Proceedings by *mandamus* will not be enjoined where full justice can be done in such proceedings. *Finegan v. Fernandina*, 18 Fla. 127.

³ *Larkin v. Mason*, 71 Ala. 227. If a creditor sells on execution, and buys in land, the title to which is in the debtor's wife, he cannot have her enjoined from suing him in trespass, although he alleges that the property was really the husband's, as he has not taken the proper course to subject lands so held to his judgment. *Cox v. Gruver*, 40 N. J. Eq. 473; 3 A. 172. The right to an injunction restraining the foreclosure of a chattel mortgage, and to a removal of the proceedings therefor into the circuit or district court under Iowa Code, art. 8317, does not exist where the applicant has a full and complete remedy in a pending action at law. *Sweet v. Oliver*, 56 Iowa, 744.

⁴ *Clarke v. Clarke*, 7 R. I. 45. But it is clear that the latter remedy would only be of value where the complainant had not been negligent or guilty of laches in presenting sufficient evidence in the first instance; and in that case the refusal to enjoin should be based upon other grounds than the existence of a remedy at law.

⁵ *People v. Chaffin*, 7 Hun, 608; *Wright v. Fleming*, 12 Hun, 469; *Gulf, C. & S. F. Ry. Co. v. Bacon*, (Tex. Civ. App.) 21 S. W. 783; *Birmingham Railway & Electric Co. v. Birmingham Traction Co.*, (Ala.) 25 So. 777. Compare *Freeman v. Carpenter*, 147 Mass. 23. The Texas district court has no power to enjoin the enforcement of a non-appealable judgment rendered by a justice

where the ground of the application was the improper exclusion of evidence by the court where the action was pending.¹ Nor will the taking of evidence by a referee appointed to take testimony in a pending cause be restrained upon the ground that his appointment was unauthorized, there being a plain and adequate remedy by appeal.²

It is sufficient reason for not granting relief by injunction that the complainant may apply to the court wherein the action is pending for a stay of proceedings, and that if an order to stay be erroneously refused, an appeal lies to correct the error.³ But where, in an action to enjoin defendant from bringing separate suits on a large number of claims against plaintiff which involved precisely the same questions, and fell within the jurisdiction of a justice, the petition set up facts showing a perfect defence to the claims, it was held that the amount in controversy on each claim being such as to preclude an appeal from the justice, relief would be granted.⁴

§ 47. *When issued by Court to protect its own Jurisdiction.* — Courts of equity will not interfere with proceedings in courts of law, except in the cases in this chapter enumerated. They will protect their jurisdiction when once acquired, and maintain their control of the parties and of the matter in controversy. But it is also a well-established rule that a court of equity will

of the peace. *Galveston, H. & S. A. R. Co. v. Dowe*, 70 Tex. 5; 7 S. W. 368. One cannot be enjoined from prosecuting his demand to be appointed dative executor; the remedy is by opposition and appeal. *Hall v. Egelly*, 35 La. An. 312. *Pending appeal.* — Civil Code Col. § 144, gives to district courts and judges power to grant injunctions "pending proceedings in the supreme court on appeal or writ of error," with a view to relieving the supreme court from the duty of considering applications for such injunctions, of which it will only assume jurisdiction when there exists some unusual or extraordinary reason therefor. *Johnson v. Young*, 13 Col. 382; 22 P. 769. A circuit court may grant an injunction to a judgment at law, although a writ of error to the judgment is pending in the supreme court. *Parker v. The Judges*, 12 Wheat 561. See also *Roshell v. Maxwell*, Hempst. 25. But the supreme court of California will not grant an order restraining the prosecution of an action on a bond given on the issuing of a restraining order, pending an appeal by the obligor from the action of the court in vacating his restraining order, and denying his application for injunction. *Adams v. Andross*, 77 Cal. 483; 20 P. 26.

¹ *Wright v. Fleming*, 12 Hun, 469.

² *Shoemaker v. Axtell*, 78 Ind. 561.

³ *Wood v. Swift*, 81 N. Y. 31.

⁴ *Galveston, H. & S. A. Ry. Co. v. Dowe*, 70 Tex. 5; 7 S. W. 368.

not grant an injunction to stay proceedings in the same separate court of equity, either upon application of the parties to the proceeding or of strangers. For this rule there are two reasons: 1. A different practice would lead to interminable litigation. 2. There is no necessity for enjoining a party from prosecuting another bill in equity in the same court, since the party against whom it is brought may either protect himself by interposing as a defence to it that another suit is pending concerning the same subject-matter, or he may avail himself of all the equities and defences which exist in his favor in the first suit.¹ An injunction will be granted, however, to restrain one basing his complaint upon the execution of process from a court of chancery from proceeding with the action at law.²

¹ *Smith v. American Co.*, 1 Clarke Ch. 307; *Lane v. Clark*, Id. 310; *Erie R. Co. v. Ramsey*, 57 Barb. 449; *Jackson v. Leaf*, 1 Jac. & W. 229; *Redd v. Blandford*, 54 Ga. 123; *Dayton v. Relf*, 34 Wis. 86; *Schell v. Erie R. Co.*, 51 Barb. 368. Compare *Mann v. Flower*, 26 Minn. 479, holding that an exception should be made when the party aggrieved cannot have full and adequate relief by intervening in the original suit. See also *Cochrane v. O'Brien*, 6 Ir. Eq. 312. When an interlocutory injunction had been obtained in an action of interpleader to restrain further proceedings at law, and there appeared to be a serious question to be determined upon the hearing, the injunction was continued until the final hearing. An injunction cannot be issued by the court of common pleas to restrain an execution of the supreme court, upon a decree of alimony. *Sample v. Ross*, 16 Ohio, 419.

² *Walker v. Micklethwait*, 1 Drew. & Sm. 49. But where serious damage had resulted from false imprisonment upon an attachment irregularly issued in a chancery proceeding, an injunction to restrain the party from proceeding was refused, although he was still subject to the jurisdiction of the court. *McKinnon v. Palmer*, 7 Ir. Eq. 496. Proceedings in equity having gone to the extent of rendering a decree for an accounting, the plaintiff in the action was enjoined from proceeding at law touching the same matter. *Mocher v. Reed*, 1 Ball & B. 318. See also *Pusey v. Bradley*, 1 Thomp. & C. 661, where creditors of a railroad company who had begun an action in a state court to enforce a statutory lien upon the corporate property for labor performed in construction of the road, were enjoined from instituting proceedings in bankruptcy pending the action; *Dehon v. Foster*, 4 Allen, 545; *Bank of B. Falls v. Rutland*, 28 Vt. 470; *Hayes v. Ward*, 4 Johns. Ch. 123; *Keyser v. Rice*, 47 Md. 203; *Snook v. Snetzer*, 25 Ohio St. 516; *Vermont & Canada R. R. Co. v. Vermont Cen. R. Co.*, 46 Vt. 792; *Massie v. Watts*, 6 Cranch, 148; *Mercantile Trust Co. v. Baltimore & O. R. Co.*, 89 F. 606; *National Bank v. Carlton*, (Ga.) 23 S. E. 388; 96 Ga. 469; *Carlton v. National Bank*, Id. Compare *Burgess v. Smith*, 2 Barb. Ch. R. 276; *Williams v. Ayrault*, 31 Barb. 364; *Carroll v. Farmers' & Mechanics' Bank*, Harring. (Mich.) 197. See also *Pickett v. Ferguson*, 45 Ark. 177; *Engel v. Scheuerman*, 40 Ga. 206; *Hines v. Rawson*, 40 Ga. 356; *Zimmerman v. Franke*, 34 Kan. 650; *Cuthbert v. Chauvet*, 14 N. Y. S. 385; *Tantlinger v. Sullivan*, 80 Iowa, 218; 45 N. W. 765;

§ 48. **Same Subject — Interpleader.** — An exception, or at least a modification of the rule just stated, is required to be made in actions of interpleader in equity, owing to the peculiar character of such actions and the necessity of bringing the whole subject of litigation into one principal action. Therefore where, pending a bill of interpleader, one of the defendants was suing plaintiff in the proceeding in an action at law and another was proceeding against him in equity, it was held an injunction should be granted to restrain both actions.¹

§ 49. **Injunction against Parties to Actions in Foreign Courts.** — The exercise by courts of chancery of jurisdiction to interfere by injunction directed to the parties to litigation in foreign tribunals has given rise to considerable controversy and conflict of authority. This jurisdiction was formerly denied to the English court of chancery.² The right and power to thus control and restrain the parties is now well established, both in England

Mo. Pac. R. Co. v. Maltby, 84 Kan. 125; Vail v. Knapp, 49 Barb. (N. Y.) 299; Claffin v. Hamlin, 62 How. Pr. (N. Y.) 284; Kittle v. Kittle, 8 Daly (N. Y.), 72; Lawrence v. Manning, 56 Hun, 641; 9 N. Y. S. 223; Brower v. Baucus, 14 N. Y. S. 462; Erie R. Co. v. Ramsey, 45 N. Y. 637; Dobson v. Pearce, 4 Duer (N. Y.), 142; Fisk v. Union Pac. R. Co., 10 Blatchf. (U. S.) 518; French v. Hay, 22 Wall. (U. S.) 250; Carron Iron Co. v. McLaren, 5 H. L. Cas. 438; Mead v. Merritt, 2 Paige (N. Y.), 402; Bicknell v. Field, 8 Paige (N. Y.), 440; Harris v. Pullman, 84 Ill. 20; Evans v. Taylor, 28 W. Va. 184; Cole v. Young, 24 Kan. 435; Great Falls, etc. Co. v. Worster, 25 N. H. 462; Bank v. Rutland, etc. R. Co., 28 Vt. 470; Dinsmore v. Neresheimer, 32 Hun (N. Y.), 204; Wilson v. Joseph, 107 Ind. 490; Pindell v. Quinn, 7 Ill. App. 655; Baltimore, etc. R. Co. v. May, 25 Ohio St. 347; Pearce v. Olney, 20 Conn. 543; Cunningham v. Butler, 142 Mass. 47. "In exercising this authority courts proceed not upon any claim of right to control or stay proceedings in the courts of another state or country, but upon the ground that the person upon whom the restraining order is made resides within the jurisdiction and is in the power of the court issuing it. They do not pretend to direct or control the foreign court, but, without regard to the situation of the subject-matter of dispute, they consider the equities between the parties and decree *in personam* according to those equities, and enforce obedience to their decrees *in personam*." Foster v. Vassall, 3 Atk. R. 589; Toller v. Carteret, 2 Vern. 494; Snook v. Snetzer, 25 Ohio St. 516; Penn v. Ld. Baltimore, 1 Ves. Sen. 444; Portarlington v. Soulby, 2 M. & K. 104. The court having jurisdiction of proceedings for the dissolution of an insolvent corporation, may, where such course is clearly necessary, enjoin the prosecution of actions against the corporation in other courts. Phoenix Foundry & Machine Co. v. North River Construction Co., 33 Hun (N. Y.), 156.

¹ Crawford v. Fisher, 10 Sim. 479; Prudential Assur. Co. v. Thomas, L. R. 3 Ch. App. 74; Warrington v. Wheatstone, Jac. 202.

² See Lowe v. Baker, Freem. Ch. 125.

and in this country. In exercising it courts do not assume any power to control the courts of a foreign state or country. Such an assumption would manifestly conflict with the idea of national and state sovereignty. But substantially the same result is indirectly accomplished in cases where the preservation of equitable rights and the attainment of the ends of justice require that parties shall be restrained from prosecuting or prevented from instituting actions in foreign tribunals to which they have resorted by the exercise by the court of its authority over the parties within its jurisdiction. In such cases the authority is wielded against the parties *in personam*, the mandate being directed to them, and not to the tribunal in which the action is pending.¹

¹ *Sandage v. Studebaker Bros. Manuf'g Co.*, 41 N. E. 380; 142 Ind. 148; *Hawkins v. Ireland*, (Minn.) 67 N. W. 73; *Allen v. Buchanan*, (Ala.) 11 So. 777; *Kelly v. Siefert*, 71 Mo. App. 143; *Spreckels v. Sugar Co.*, 117 Cal. 377; *Miller v. Gittings*, 85 Md. 601; 60 Am. St. Rep. 352; *Gage v. Riverside Trust Co.*, 86 F. 984; *Huettinger v. Huettinger*, (N. J.) 43 A. 574. The whole subject was ably discussed in *Portarlington v. Soulby*, 3 Myl. & K. 104, by Lord Chancellor Brougham, as follows: "I have directed a search to be made for precedents, in case the jurisdiction had been exercised in any instances which have not been reported, and one has been found directly on the point. It is the case of *Campbell v. Houlditch*, in 1820, where Lord Eldon ordered an injunction to restrain the defendant from further proceedings in an action which had commenced before the court of session in Scotland. From the note which his Lordship himself wrote upon the petition requiring a further affidavit, and from his refusing the injunction to the extent prayed, it is clear that he paid particular attention to it. This precedent, therefore, is of very high authority. In truth, nothing can be more unfounded than the doubts of the jurisdiction. That is grounded, like all other jurisdiction of the court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom this order is made being within the power of the court. If the court can command him to bring home goods from abroad, or to assign chattel interests, or to convey real property locally situate abroad; if, for instance, as in *Penn v. Baltimore*, 1 Ves. Sen. 444, it can decree the performance of an agreement touching the boundary of a province in North America, or, as in the case of *Tellor v. Carteret*, 2 Vern. 449, can foreclose a mortgage in the Isle of Sark, one of the Channel Islands, in precisely the like manner it can restrain the party being within the limits of its jurisdiction from doing anything abroad, whether the thing forbidden be a conveyance, or other act *in pais*, or the instituting or prosecution of an action in a foreign court." See also *Cranston v. Johnston*, 3 Ves. 182; 5 Ves. 277; *Kittle v. Kittle*, 8 Daly, (N. Y.) 72; *Pindell v. Guinn*, 7 Ill. App. 605; *Bunbury v. Bunbury*, 3 Jur. 648; affirming s. c. 1 Beav. 313; *Carron, etc. v. Maclaren*, 5 H. L. Cases, 416; *Beckford v. Kemble*, 1 Sim. & Stu. 7; *Harrison v. Gurney*, 2 Jac. & W. 563; *Bowles v. Orr*, 1 Y. & C. 464. In the

litigation is mortgaged property situated in a foreign jurisdiction; and an injunction will not be granted to restrain creditors having a mortgage upon property in another country from proceeding to litigate and settle their rights touching the disposition of the property in its courts, especially when the foreign court has first acquired jurisdiction.¹

A court of equity will not interfere by reason of a decree or judgment in a foreign country upon the same subject-matter, unless it be satisfied that the foreign decree or judgment fails to do complete justice between the parties or does not cover the entire controversy.²

§ 51. **Conflict of Jurisdiction between State and Federal Courts.** — With respect to the principles governing the respective jurisdictions of state and federal courts in the matter of controlling and enjoining parties litigant, such courts are not regarded as foreign to each other, in the sense that two states or two nations are; and yet in most matters a clear line of separation has been fixed in the federal constitution, and in statutes enacted by Congress under constitutional provisions. Although the constitution is silent upon the right of the courts of either of the two jurisdictions to enjoin parties from resorting to the other or proceeding with suits already begun in courts of the other, yet a rule was early adopted, and has by frequent recognition become established, to the effect that injunctions will only be granted by a state tribunal to restrain proceedings in a federal court, and *vice versa*, when necessary to protect the jurisdiction of the

¹ *Moor v. Anglo-Italian Bank*, 10 Ch. D. 681. In *Pennell v. Roy*, 3 De G. M. & G. 126, the English court of chancery refused to enjoin a creditor of a bankrupt in England, who had not presented his demand for allowance against the bankrupt's estate, from proceeding with an action in Scotland to make his claim out of real property of the bankrupt situated there. The Massachusetts courts will not enjoin a citizen of that state from prosecuting a suite in a state court of another state, to foreclose a mortgage of land situated there, on the ground that the supreme court of that state, as indicated by previous rulings in the case, entertains views of the laws governing the rights of parties differing from those held by the supreme court of the United States, as indicated by its previous rulings in the case. *Carson v. Dunham*, 149 Mass. 52; 20 N. E. 312. An order will not be granted staying plaintiff from pursuing in the courts of another state land situated therein, belonging to defendant, as such an order would be a violation of the comity between the courts of different states. Distinguishing *Bowers v. Durant*, 43 Hun, 348; *Durant v. Pierson*, 12 N. Y. S. 145.

² *Oslell v. Le Page*, 2 De G. M. & G. 892.

court first acquiring control of the parties and the subject-matter, and in these cases only *in personam*.

§ 52. **Injunction to protect Jurisdiction already acquired.** — State courts have uniformly been governed by the same rules governing federal courts as regards interference with litigation, and decline to enjoin parties from proceeding with actions already brought in federal courts, however apparent the resulting hardship and injustice of allowing them to proceed, except where such interference by restraining process *in personam* was necessary to protect their own jurisdiction already acquired.¹ Nor will a state court in any case attempt to restrain parties resident in another state from proceeding in a federal court.²

The legal rights of the United States under the revenue laws will rarely be interfered with by injunction. Relief must be applied for to the treasury department, which alone has jurisdiction to grant it.³

§ 53. **Rule in Federal with Respect to State Courts.** — Federal courts independent of the provisions of the judiciary act to be presently noticed observe the same rule of non-interference with state courts as is observed by the latter with respect to them. They will not enjoin parties from proceeding in state courts except in the protection of a jurisdiction already acquired. Thus a federal court disclaimed jurisdiction to enjoin the service of warrants by police officers where issued for violation of municipal ordinances alleged to be void because repugnant to

¹ *Riggs v. Johnson Co.*, 6 Wall. 166; *United States v. Keokuk*, 6 Wall. 514; *McKim v. Voorhies*, 7 Cranch (U. S.), 279; *Coster v. Griswold*, 4 Edw. Ch. (N. Y.) 364; *Schuyler v. Pelissier*, 3 Edw. Ch. 203; *Thompson v. Norris*, 63 How. Pr. (N. Y.) 418. Compare *Hines v. Rawson*, 40 Ga. 356; s. c. 2 Am. Rep. 581; *Ackerly v. Vilas*, 15 Wis. 401; *Home Ins. Co. v. Howell*, 9 C. E. Green, 238. In a few cases state courts have been declared entirely destitute of any power of interference. *Phelan v. Smith*, 8 Cal. 520; *Riggs v. Johnson*, 6 Wall. 166; *Coster v. Griswold*, 4 Edw. Ch. 364. See also opinion of Justice Clifford in *U. S. v. Keokuk*, 6 Wall. 514. Defendant was enjoined from prosecuting an action in a federal court by a state court which had already acquired jurisdiction of the parties and the subject-matter. *Home Ins. Co. v. Howell*, 9 C. E. Green, 238. Plaintiff enjoined under similar circumstances. *Ackerly v. Vilas*, 15 Wis. 401. Where a plaintiff, having sued a shipowner personally for damages in a state court, was enjoined by a federal court of admiralty jurisdiction which had subsequently entertained jurisdiction, he was allowed to proceed with his action in the state court regardless of the injunction. *Knowlton v. Prov. & N. Y. S. Co.*, 53 N. Y. 76.

² *Worthington v. Lee*, 61 Md. 530.

³ *Powell v. Redfield*, 4 Blatch. 45.

It is no objection to the granting of an injunction to restrain the parties from proceeding in a foreign jurisdiction that the property forming the subject of the litigation is situated therein, provided all the parties to the litigation are within the jurisdiction of the court to which the application is made and are answerable to its process, and it is apparent that the matters in controversy can be there more expeditiously adjusted, and the ends of justice better attained. An injunction will be issued against a party to an action at law in such case, where the party sought to be enjoined is within the jurisdiction of a court of equity, enjoining him.¹

§ 50. **Same Subject — Further Illustrations.** — It was held that if A., a citizen of Massachusetts, knowing that his debtor resides there, had stopped payment in anticipation that proceedings in insolvency would be begun against the debtor, and made an assignment of his claim to a citizen of another state, without

case in which the foregoing exposition was made, an injunction was held properly granted in England to restrain the indorsee of a bill of exchange from bringing suit upon it in the courts of Ireland, the grounds being such as would have warranted relief against it on equitable principles in England. See also *Beauchamp v. Marquis of Huntly*, Jac. 546, where a creditor, having availed himself of a decree in England relieving him against the assets of an estate there, was enjoined from proceeding with a suit against the same estate in Ireland. The principle was recognized and given effect in the Irish court of chancery, and a suit in England enjoined in *Parnell v. Parnell*, 7 Ir. Ch. 322. An injunction was granted to restrain proceedings in a foreign tribunal where the parties had reached a decree, and a settlement of accounts under the same was pending before a master in chancery. *Wedderburn v. Wedderburn*, 2 Beav. 208.

¹ *Bunbury v. Bunbury*, 1 Beav. 318, aff'd 3 Jur. 648; *Beckford v. Kemble*, 1 Sim. & Stu. 7; *Claffin v. Hamlin*, 62 How. (N. Y.) Pr. 284; *Kittle v. Kittle*, 8 Daly (N. Y.), 72; *Cranston v. Johnson*, 3 Ves. 182; *Carron v. McClaren*, 5 H. L. Cas. 416; *Harrison v. Gurney*, 2 Jac. & W. 563; *Portarlington v. Soulby*, 3 Myl. & K. 104; *McLaren v. Stainton*, 16 Beav. 279; *Mackintosh v. Ogilvie*, 4 T. R. 193; *Bushley v. Munday*, 5 Madd. R. 297; *Bowles v. Orr*, 1 Y. & C. 464; *Wilson v. Joseph*, 107 Ind. 490. In such cases the court will balance the relative conveniences and inconveniences to the parties in the respective jurisdictions. *Jones v. Geddes*, 1 Ph. 724. Foreclosure of a mortgage in a court of another country was enjoined where all the parties were within the jurisdiction of the domestic court which had, under a bill to redeem, ordered an inquiry to ascertain the amount due. *Beckford v. Kemble*, 1 Sim. & Stu. 7. A statute in Indiana makes it a criminal offence to send a claim against a debtor out of the state for collection in evasion of the exemption laws; and injunction will lie to restrain a resident of Indiana from prosecuting an attachment proceeding against another resident, in the courts of another state. R. S. Ind. 1881, sec. 2162; *Wilson v. Joseph*, 107 Ind. 490; *Uppinghouse v. Mundel*, 103 Ind. 238.

consideration, and the latter had, before proceedings in insolvency, brought an action upon the claim in said state and attached property of the debtor there, the Massachusetts court would, on a bill in equity, by the assignee in insolvency of the debtor, restrain A. from prosecuting the action to judgment, provided A. had control of such action.¹ In another case it was held in Massachusetts that the court had jurisdiction in equity upon a proper case to enjoin a citizen of Massachusetts from availing himself of an attachment of personal property in another state, the action being against the debtor, who was insolvent under the laws of Massachusetts, thus preventing the same from coming to the hands of the assignee. It was held not a valid objection that the action was commenced before the institution of proceedings in insolvency, if this was done with a knowledge that such proceedings were about to be instituted, and with a view to obtaining a preference.² On the same principle where a creditor and debtor both being citizens of the same state, the creditor instituted attachment and garnishment proceedings in another state and attached credits there which would have been exempt by the law of the debtor's domicile, the creditor was enjoined from further prosecuting the action. The court regarded it as an attempt to evade the laws of the state of their common domicile.³ But the relief will not be granted when full and complete justice can be done to all parties in interest in the pending litigation in another state or country.⁴ This rule has a special application where the subject-matter of

¹ *Cunningham v. Butler*, 142 Mass. 47; s. c. 56 Am. Rep. 657. Compare *Cole v. Young*, 24 Kan. 435.

² *Dehon v. Foster*, 7 Allen (Mass.), 57. See also *Lawrence v. Batcheller*, 131 Mass. 504.

³ *Kayser v. Rice*, 47 Md. 203; *Moton v. Hull*, 77 Tex. 80; 13 S. W. 849. See also *Teager v. Landsley*, 69 Iowa, 725; *Hager v. Adams*, 70 Iowa, 746; *Snook v. Snetzer*, 25 Ohio St. 516. The New York courts recognize the validity of certain limitations of a carrier's liability. The supreme court of the District of Columbia denies their validity. *Held*, that the prosecution of the suit brought in the District of Columbia by a resident of New York against a carrier, which might have been sued in New York, should be enjoined, the object of bringing the suit being, apparently, to take advantage of the law as ruled in the district. *Dinsmore v. Neresheimer*, 32 Hun (N. Y.), 204.

⁴ *Harris v. Pullman*, 84 Ill. 20. See also *Mead v. Merritt*, 2 Paige (N. Y.), 402; *Boyd v. Hawkins*, 2 Dev. (N. C.) Eq. 329; *Schuyler v. Pelissier*, 3 Edw. (N. Y.) 191; *Burgess v. Smith*, 2 Barb. (N. Y.) Ch. 276.

ciary Act of 1793 do not extend to cases where the jurisdiction of a federal court had attached before the state courts have acquired jurisdiction, and the right of the former to protect jurisdiction already obtained of the parties and the subject-matter, is well established.¹

§ 55. **Similarity of English and American Doctrines.** — The English doctrine on this subject with its limitations may now be considered incorporated in the jurisprudence of this country. A court of equity here will not, any more than in England, seek by injunction to interfere with or control the actions of courts in another state, but will restrain persons within its jurisdiction from resorting to foreign tribunals for purposes of oppression and wrong. The principles applicable where injunctions are sought against parties to restrain them from prosecuting their actions in the courts of foreign nations apply where the injunction is sought to restrain the citizens of one state from proceeding in the courts of another. In regard to the facts and circumstances which will warrant a court of one state in restraining parties within its jurisdiction from prosecuting an action in the courts of a sister state, the rule of the English courts before stated is well settled, and in a proper case, a court of one state will enjoin parties within its jurisdiction from instituting legal proceedings in another, or from further proceedings in an action already commenced.

In a few cases the jurisdiction has been recognized to the extent of enjoining the commencement of actions, but denied for the purpose of restraining the prosecution of actions already begun. Such seems to be the prevailing view in New Hampshire and Michigan; but even in these states important exceptions are recognized.² No such restraining order will be made simply because the litigation is in a foreign state, or to enforce a mere legal right, even though such right be granted by the statutes of the

Diggs v. Walcott, 4 Cranch, 179; *Moore v. Holliday*, 4 Dill. 52; *Freeney v. First Nat. Bank*, 3 McCrary, 622; *Rensalear, etc. R. Co. v. Bennington, etc. R. Co.*, 18 Fed. R. 617.

¹ *French v. Hay*, 22 Wall. 250; *Fisk v. Union Pac. R. Co.*, 10 Blatchf. 518. See also *Union, etc. Co. v. University*, 10 Biss. 191. Federal courts have frequently recognized the provision of the federal Judiciary Act of 1793 in matters connected with the settlements of estates of decedents. See *Haines v. Carpenter*, 1 Otto, 254; *Dial v. Reynolds*, 6 Otto, 340.

² See *Falls, etc. Co. v. Worster*, 23 N. H. 470; *Carroll v. Farmers' & Mech. Bank, Harr. (Mich.)* 197.

state where the injunction is sought, but only where there is an adequate equity which impels such restraining order.¹

§ 56. **Complainant must be diligent in seeking Relief.** — The rule that the party applying for the relief must not have been guilty of laches applies in this class of cases. Laches in making the application will estop the party.² And a party's acts may constitute a waiver of the equitable remedy.³ Suits against a sheriff for having in his official capacity sold property on execution to which there are conflicting rights will not be enjoined where he might under statutory provisions have required indemnity.⁴ An injunction to restrain proceedings at law and give a change of venue will be granted, however, where the facts entitling a party to such change have come to his knowledge too late to avail him at law.⁵ But an injunction will not be granted in favor of one who has gone voluntarily to trial, merely to give him an opportunity to secure the impeachment of a witness of the nature of whose testimony he has had ample time to inform himself.⁶

§ 57. **And show an Equitable Right.** — The rule that a party seeking an extraordinary remedy must show a clear right in himself to have the thing done or prevented is as applicable to cases where the threatened wrong will result from unconscionably prosecuting legal actions as to other cases. It is immaterial what motives actuate the plaintiff in the action at law; and unless the application for an injunction presents a case entitling him to equitable relief, it will not issue because the action is bought from malicious motives.⁷

The leading principle above stated was applied and an injunction refused: where sought to restrain the legal owner of land from proceeding at law to recover possession, when an apparently equitable title was passed in fraud of creditors, plaintiff claiming

¹ *Cole v. Young*, 24 Kan. 435.

² *Jones v. Bennett*, 1 Bro. P. C. 528; *Smith v. Whittemore*, 1 H. & M. 576; *State v. Rightor*, 25 So. 972; 51 La. An. 1197.

³ *Attalla Mining & Manufg Co. v. Winchester*, (Ala.) 14 So. 565.

⁴ *Storrs v. Payne*, 4 Hen. & M. 506.

⁵ *Darnsdatt v. Wolfe*, 4 Hen. & M. 246.

⁶ *Woodworth v. Van Buskerk*, 1 Johns. Ch. 432.

⁷ *Clarke v. Clapp*, 14 R. I. 248; *Chesapeake Guano Co. v. Montgomery*, (Ala.) 22 So. 497; *McInnes v. McInnes Brick Manufg Co.*, (N. J. Ch.) 38 A. 182; *Michael v. Kronthal*, 34 N. Y. S. 681; 13 Misc. Rep. 428; *German Sav. Bank v. Friend*, (Super. N. Y.) 20 N. Y. S. 434.

under it having knowledge of, and participating in the fraud;¹ to restrain the defendant from proceeding in an action of ejectment against a tenant of land, which such defendant had legally purchased in an attachment sale, the complainant being an adverse claimant to the land, whose title was knowingly acquired through a conveyance in fraud of creditors;² to restrain the holder of a legal title to land from prosecuting an action of trespass against one in possession, it not having been established that the latter had even an equitable right;³ to restrain an action of forcible entry and detainer, the complainant having obtained possession by force;⁴ to restrain proceedings at law to recover damages against one who had fraudulently obtained a decree in chancery subsequently set aside on account of such fraud.⁵

And the complainant must not only be himself free from fault, and present an equitable claim to relief, but such claim must be free from doubt, that is, not resting in mere conjecture and opinion.⁶

§ 58. **Substantial Grounds for Apprehension must appear.** — It is a well-settled general principle that mere apprehensions on the part of the applicant for relief that he is about to be involved in actions at law are not alone sufficient to warrant the court in granting relief by injunction. The court should be satisfied that there exist substantial grounds for his fears.⁷ Nor will equity

¹ *Powers v. Canada*, 40 N. J. Eq. 602; reversing s. c. 38 N. J. Eq. 412.

² *Id.*

³ *Cox v. Gruer*, 40 N. J. Eq. 473.

⁴ *Turnley v. Hanna*, 67 Ala. 101. See also *Ex parte Clarke*, 1 Russ. & M. 568.

⁵ *Peck v. Woodbridge*, 3 Day, 508.

⁶ *Roemer v. Conlon*, 45 N. J. Eq. 234; 19 A. 664. See also *Arnold v. Arnold*, 62 Ga. 627; *Barrick v. Horner*, (Md.) 27 A. 1111; *Gunn v. Hardy*, (Ala.) 18 So. 284.

⁷ *Wolf v. Burk*, 56 N. Y. 115, reversing s. c. 7 Lans. 151; *Wallack v. Sac*, 67 N. Y. 23; *Hammel v. Clarke*, (Miss.) 23 So. 358; *Attalla Mining & Manuf'g Co. v. Winchester*, (Ala.) 14 So. 565; *Carney v. Hadley*, (Fla.) 14 So. 4; 32 Fla. 344. Where, upon application for an injunction against an action at law upon a written agreement, the bill failed to state that parol proof could be given of the contents of such agreement, and the defendant in his answer denied all knowledge of such agreement and stated facts inconsistent therewith, relief was refused. *Kent v. De Baun*, 1 Beas. 220. The fact that plaintiff has no cause of action, no ground for the relief, *Chadoin v. McGee*, 20 Tex. 476; nor the fact that a note sued upon is entitled to a credit not appearing thereon, complainant making no tender of the remainder. *Powell v. Chamberlain*, 22 Ga. 123. To maintain an injunction to restrain

ever restrain proceedings at law, unless it be shown that the person seeking the relief is aggrieved by the proceeding, and that irreparable injury will result from a regular prosecution of the action to final judgment.¹ Nor is it sufficient to warrant a court of equity in granting an injunction that the petitioner fears a court of competent jurisdiction wherein an action has been or is about to be brought will decide it improperly. This rule was applied where an injunction was sought to prevent a defendant in an action at law from applying to another court of equity powers for an injunction against complainant in the action.² That the executrix of an insolvent estate is insolvent, and that a creditor fears that if real estate is sold he cannot collect, does not justify enjoining the sale, no attempt at mismanagement or waste being alleged.³ Nor does a threat of plaintiff in the action at law to renew the action in case he should not prevail in a pending action constitute any ground for an injunction, since the judgment, in whosoever favor rendered, may be pleaded in bar to any subsequent action.⁴

To entitle one to an injunction against a proceeding at law, the substance of the ground of relief must not only be fully alleged, but the bill must show grounds upon which the action at law may be sustained; otherwise it is demurrable.⁵

the collection of purchase-money for land, it must at least be shown that the grantor is insolvent. *Wimberg v. Schwegeman*, 97 Ind. 528.

¹ *Lambert v. Lambert*, 5 Ir. Eq. 389.

² *Wallack v. Sac*, 67 N. Y. 23. An action at law will not be enjoined because it is probable that plaintiffs cannot recover, or that if they should recover they would hold the proceeds of the judgment in trust for defendants. *Long Dock Company v. Bentley*, 37 N. J. Eq. 15.

³ *Elam v. Elam*, 72 Ga. 162. A mere volunteer who has paid no consideration cannot have an injunction to restrain the enforcement of a vendor's lien. *Petry v. Ambrosier*, 100 Ind. 510.

⁴ *Hartman v. Heady*, 57 Ind. 545. In suit by a banking corporation, an allegation, substantially, that the bank commissioners threaten to commence divers actions, etc., against plaintiff for refusing to let them examine the affairs of the bank, — *held*, not to support an injunction. *Wells v. Coleman*, 53 Cal. 416.

⁵ *Worthington v. Lee*, 61 Md. 530. In an action of ejectment against a tenant in possession, when the defendant's landlord intervenes, no equitable issues are disclosed by the landlord's pleadings where nothing more is averred than an unexecuted design, by collusion between the tenants of the intervenor and the plaintiff, to allow a judgment by default against the defendant before the landlord was informed of it, and it is error to enjoin the plaintiff from proceeding in his action. *Reay v. Butler*, 69 Cal. 572; 11 P. 463. Further, as to what plaintiff must show to entitle him to relief, see *Ide v. Ball Engine*

§ 59. **To suppress Vexatious Litigation and Multiplicity of Suits.**

—Injunction to prevent protracted and vexatious litigation at law is a favorite branch of equitable jurisdiction. The applications upon which injunctions are granted in cases of this character are known in chancery practice as “Bills of Peace.” They have been allowed only in two classes of cases: First, where the plaintiff has already satisfactorily established his right at law; Second, where the persons who controvert it are so numerous as to render an issue, under the direction of the court, embracing all the parties concerned, indispensable to prevent a multiplicity of suits.¹ And it may be stated as a general rule that, whenever the rights of a party cannot be enforced in the ordinary course of legal procedure except by numerous and expensive suits, a proper case is presented for the interposition of a court of equity and the granting of an injunction.² Thus where an injury complained of

Co., 31 F. 907. An injunction to restrain the collection or assignment of a note given in part payment for lands conveyed by defendant to complainant with full covenants of warranty, allowed on the ground that the title was defective, the defendant having only a life estate, was dissolved after answer, it appearing that the complainant remained in undisturbed possession of the land. *Hile v. Davison*, 20 N. J. Eq. (5 C. E. Gr.) 228.

¹ *Eldridge v. Hill*, 2 Johns. Ch. 281, per Kent, Chancellor; *Lord Bath v. Sherwin*, 1 Bro. P. C. 266; *Huntington v. Nicholl*, 8 Johns. (N. Y.) 566; *West v. New York*, 10 Paige (N. Y.), 539; *Dedman v. Chiles*, 8 Mon. (Ky.) 426; *Minor v. Webb*, 10 Abb. (N. Y.) Pr. 284; *Coville v. Gilman*, 13 W. Va. 314; *Morse v. Morse*, 44 Vt. 84; *Bishop v. Rosenbaum*, 58 Miss. 84; *Smith v. Bivens*, (C. C.) 56 F. 352; *Farmington Village Corp. v. S. River Nat. Bank*, 26 A. 965; 85 Me. 46; *Shafer v. Stull*, 32 Neb. 94; *Kellogg v. Chenango Valley Sav. Bank*, 42 N. Y. S. 379; 11 App. Div. 458. A sheriff from whom goods have been replevied will not be enjoined from attaching them in favor of persons not parties to the replevin suit, on the ground that such successive attachments are vexatious. *Patterson v. Seaton*, 64 Iowa, 115. A married woman in possession of her separate real estate may maintain a bill in equity against a purchaser at a sheriff's sale on a judgment against her husband who persists in bringing ejectment suits not in good faith and taking voluntary nonsuits, but with the purpose of compelling payment of the debt. *Thompson's Appeal*, 107 Pa. St. 559.

² *Pennsylvania C. Co. v. Delaware & H. C. Co.*, 31 N. Y. 91; *Williams v. Williams*, (Ga.) 20 S. E. 108; 94 Ga. 627; *Texas & P. Ry. Co. v. Kuteman*, (C. C. A.) 54 F. 547. After a creditor of an insolvent firm of wholesale clothiers had attached their entire stock, other persons claiming to be creditors for goods sold assumed to rescind the sales, as having been induced by fraud, and replevied the goods, which they took from the possession of the sheriff. There were more than fifty of these actions, some claiming cloth, some linings, and others trimmings; so that entire garments were replevied by persons who had merely furnished the buttons thereon, and others were sought to be taken by several different creditors. The fraud complained of

is a continuing one, to redress which numerous suits would have, to be brought from time to time, injunction will be granted.¹

The same reason exists for relief by injunction where there is one common right in controversy to be established by or against several persons. In such case one person setting up the right against many, or many against one, may be required to refrain from litigating their rights at law, and to come into a court of equity, and there determine the whole matter in one action.² As a condition precedent to this jurisdiction, complainant may be required to first establish his rights at law.³

An injunction to prevent a multiplicity of suits will only be granted where the subject-matter as well as the parties to the threatened action are substantially the same. The fact that several separate and distinct suits have been or are about to be brought by as many different persons, but founded on separate and distinct grounds, does not present a case warranting the granting of an injunction to prevent a multiplicity of suits.⁴ Re-

consisted of false representations as to the solvency of the firm, made to the different creditors as part of the same general purpose to defraud. *Held*, that the attaching creditor might maintain a suit to restrain further proceedings in replevin, to have a receiver appointed, and to compel the litigation of all the adverse claims in one suit. *Board v. Deyoe*, 77 N. Y. 219, followed. 16 N. Y. S. 343, affirmed.—*National Park Bank v. Goddard*, (N. Y. App.) 30 N. E. 566. *In patent-right cases*.—In a suit for infringement of a patent, a court of equity has the power, upon petition of defendants, to restrain complainant from bringing further suits against the purchasers or users of the patented article, and will do so when the affidavits filed by defendants show that the suits brought are vexatious and oppressive. *National Cash Register Co. v. Boston Cash Indicator & Recorder Co.*, 41 F. 51.

¹ *Lonsdale Co. v. Cook*, (R. I.) 44 A. 929.

² *Tenham v. Herbert*, 2 Atk. 463; *Sheffield Waterworks v. Yeomans*, 2 L. R. Ch. App. 8; *Crews v. Burcham*, 1 Black, 352; *Woodruff v. Fisher*, 17 Barb. 224.

³ *Pennsylvania C. Co. v. Delaware & H. C. Co.*, 81 N. Y. 91.

⁴ *Haines v. Carpenter*, 91 U. S. 254; *National Union Bank v. London & River Plate Bank*, 37 N. Y. S. 741; 2 App. Div. 208. See also *Aron v. Chaffe*, 72 Miss. 159; *South & North Alabama R. Co. v. Railroad Co.*, 102 Ala. 236; *Hanstein v. Johnson*, (N. C.) 17 S. E. 155; *Tribbette v. Illinois Cent. R. Co.*, (Miss.) 12 So. 82; *Chicago City Ry. Co. v. General Electric Co.*, 74 Ill. App. 465; *French v. Union Pac. Ry. Co.*, 92 F. 28. The same rule applies when actions have been brought by various persons against a defendant for the same subject-matter whether in the same or different states. The pendency of such suits affords no ground for enjoining the prosecution of a suit against the defendant. *Lightfoot v. Planters' Banking Co.*, 58 Ga. 136. But a code provision that an injunction cannot be granted "to stay a judicial proceeding pending at the commencement of the action in which the injunction

lief by injunction against multiplicity of suits should not be granted when a single right in question is litigated between only two persons, and the decision will affect no others.¹

But a court of equity has jurisdiction to restrain the assessment of an illegal tax against a telegraph company in several counties where a multiplicity of suits can thus be prevented.²

§ 60. **Same Subject — Illustrations.** — A proper case is presented for relief on this ground where a large number of suits are pending between the same parties and concerning the same subject-matter, and the court wherein they are pending possesses no power to order a consolidation of the actions. Thus where a justice's court possessed no power to order consolidation of seventy-seven distinct suits brought therein by a city against a street railway company to recover as many penalties for running its cars without a license, the question to be determined being the same in all the suits, an injunction was granted to enjoin all the suits but one.³ Where a number of actions are brought or threatened against the same person or persons all involving the same questions, an injunction will be granted,⁴ as where repeated

is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings," applies to a suit pending in a foreign jurisdiction. *Spreckels v. Hawaiian Commercial & Sugar Co.*, (Cal.) 49 P. 353. In an action against a manufacturer of certain articles for the alleged infringement of plaintiff's patent, plaintiff will not be enjoined, on defendant's application, from commencing new suits against the latter's vendees, from whom he has the right to recover damages for the sale of the infringing articles as well as from defendant, unless irreparable injury is threatened to defendant's business, or there is evidence of malice or bad faith in plaintiff's instituting such suits. *Kelley v. Ypsilanti Dress Stay Manuf. Co.*, 44 F. 19. But the remedy by injunction against the collection of an invalid tax was held available where, although the pleadings did not make out a case for such relief, the parties stipulated certain facts going to show that a multiplicity of suits would be avoided by jurisdiction being taken in equity. *Philadelphia, W. & B. R. Co. v. Neary*, (Del.) 8 A. 363.

¹ *Eldridge v. Hill*, 2 Johns. Ch. 281; *Cowper v. Clerk*, 3 P. Wms. 157; *Kinkaid v. Hiatt*, 24 Neb. 562; *Tenham v. Herbert*, 2 Atk. 483; *Anderson v. Flanagan*, 75 Ill. App. 283; *New York Security & Trust Co. v. Blydenstein*, (Sup.) 24 N. Y. S. 164; *Metropolitan Life Ins. Co. v. Fuller*, 61 Conn. 252; *State v. Cunningham*, 81 Wis. 410; *Donnelly v. Morris*, 59 N. Y. Super. Ct. 557; *Norfolk & N. B. Hosiery Co. v. Arnold*, (Sup.) 27 N. Y. S. 661; 76 Hun, 19.

² *Western Union Tel. Co. v. Poe*, (C. C.) 61 F. 449. See also *Hanstein v. Johnson*, 112 N. C. 258; *Tribbette v. Railroad Co.*, 70 Miss. 182.

³ *Third Ave. R. Co. v. Mayor, etc.*, 54 N. Y. 159. See also *Galveston, H. & S. A. R. Co. v. Dowe*, 70 Tex. 5.

⁴ *Woods v. Monroe*, 17 Mich. 238. Compare *Douglass v. Boardman*, (Mich.) 71 N. W. 1100. A second action of ejectment, involving the same issues of

suits are threatened each week under a contract for labor.¹ So an injunction was granted to prevent the bringing of suits upon each of many different notes of the same character, and to prevent their transfer for that purpose, one having been already transferred and a suit brought for its collection.² And where the evidence indicates that trespasses are likely to be repeated an injunction will be granted to prevent a multiplicity of suits.³

Where the object for which an injunction is sought—to prevent a multiplicity of suits—may be as effectually accomplished by a motion to consolidate the suits in the court of law where they are pending as by the interposition by injunction, relief will be refused.⁴ But, notwithstanding the power given by statute to consolidate, one in possession of land with complete legal title, though not appearing of record, may have a number of ejectment suits brought by another against him as to a portion of the premises enjoined, the question as to all the premises being the same, and susceptible of determination in a single chancery proceeding, which will avoid many trials at law.⁵

fact as those decided against the plaintiff in the first action, is not vexatious litigation, which will be enjoined by a court of equity, where the statutes of the state where the land lies allow a defeated party in ejectment to bring a second action. *Dishong v. Finkbinder*, 46 F. 12. See also *Norfolk & N. B. Hosiery Co. v. Arnold*, (N. Y. App.) 38 N. E. 271; 143 N. Y. 265.

¹ *Tarbox v. Hartenstein*, 4 Baxt. 78.

² *Zeigler v. Beasley*, 44 Ga. 56. In *Eldridge v. Hill*, 2 Johns. Ch. 281, it was held that where the suit is between two persons only and but one trial at law has been had, the relief will not be granted. In *Tenham v. Herbert*, 2 Atk. 483, it was held that where there was one general right common to a number of persons, one claiming or defending against many or many against one, equity would interfere by injunction and assume jurisdiction to determine the right with a view to the prevention of a multiplicity of suits.

³ *Smithers v. Fitch*, 82 Cal. 153; 22 P. 935. For the purpose of preventing a multiplicity of suits, a court of equity has jurisdiction to restrain a township from diverting surface water from a highway, and discharging it on complainant's land. *Slack v. Lawrence Tp.*, (N. J.) 19 A. 663. Where defendants claim that there is a public highway across plaintiff's land, and in order to pass over it have many times torn down plaintiff's fences, and threaten to continue to do so, an injunction will be granted against the trespass, in order to avoid a multiplicity of suits. *Ladd v. Osborne*, 79 Iowa, 93; 44 N. W. 235.

⁴ *Peters v. Prevost*, 1 Paine, C. C. 64. See also *Lapeer Co. v. Hart*, Harr. (Mich.) 157, where an injunction against seventy-six suits brought in one day against county commissioners on county orders was dissolved, it appearing that a court of law possessed ample powers to afford the relief sought. See also *Texas Pac. Ry. Co. v. Kuteman*, 79 Tex. 465; 14 S. W. 693.

⁵ *Woods v. Monroe*, 17 Mich. 238. But for the purpose of preventing

§ 61. **Statutory Power to bring in other Parties and consolidate Actions.** — In most of the states where codes of civil procedure have been adopted, it may still be necessary for a defendant, in order that there may be a complete determination of all matters in controversy in one action, to set up the facts constituting his defence against all persons interested by a bill for an injunction. In Ohio, Indiana, Iowa, Kansas, and Nebraska the codes provide for bringing in additional parties when necessary to a complete determination of the case; and even in states where no such provisions are found in the code there is no doubt of the powers of the courts to bring in the necessary parties.¹ But no feature of the new code system will remedy the wrong of an injury threatened by multiplicity of suits; and where the entire controversy should be settled in one action, it may be proper to restrain other actions in respect to the same subject-matter in other courts.²

§ 62. **To restrain Actions in Ejectment.** — In consequence of modern legislation making judgments in ejectment conclusive unless set aside, bills of peace are less frequently necessary than formerly; and yet there are still cases where it is necessary to file such bills to prevent a multiplicity of suits concerning the right of possession of realty, and to grant injunctions as the most appropriate and decisive form of relief. A plaintiff will be enjoined from prosecuting his action when in equity and conscience he is estopped from so doing, as where by his conduct defendant has been induced to go forward with valuable improvements.³ So it

multiplicity of suits where the right has been satisfactorily established at law, it is immaterial how few or many trials have been had. *Patterson, etc. R. Co. v. Jersey City*, 1 Stockt. 434; *Dedham v. Chiles*, 8 Monr. 426. When complainants' title to land of which they are in possession has been decreed, by at least three final judgments in ejectment and in equity, to be superior to the title under which defendants claim, equity will enjoin defendants from further litigating the title at law, as threatened. *Pratt v. Kendigg*, 128 Ill. 293; 21 N. E. 495.

¹ See *Pond v. Harwood*, (N. Y. App.) 34 N. E. 768; 139 N. Y. 111.

² In *Erie R. Co. v. Ramsey*, 45 N. Y. 637, Folger, J., states the rule as follows: "The suit to bring to one judgment all the actions must be in one of the courts, and, to make that suit effectual to the end sought, the power must be in that court to enjoin the parties to the suits in the co-ordinate court from proceeding therein." See also *New York, etc. R. Co. v. Schuyler*, 17 N. Y. 592.

³ *Trenton Bkg. Co. v. McKelway*, 4 Halst. Ch. 84; *Fogarty v. McArdle*, (Ala.) 11 So. 19. Where an owner of land permits another to expend money and labor in erecting a bridge pier thereon, merely claiming damages for the land taken, equity will enjoin him from maintaining ejectment, and will quiet

was held a proper case for injunction to prevent an attempt to enforce by ejectment an adverse claim which one tenant in common has purchased against the estate.¹ And an injunction was held properly granted where the plaintiff claimed under a sheriff's deed vesting an apparent title in the grantee, but whose only effect was to cast a cloud upon the title of the owner in fee.² So it was held no abuse of the discretion of the court to grant an injunction against an action of ejectment, upon the petition of one who alleged that she had a vested remainder in the land in dispute, after the life-estate of defendant in ejectment; that the latter had acknowledged service in the ejectment suit, but had concealed the pendency of the suit from petitioner; and that petitioner believed that a fraudulent conspiracy existed between the parties in ejectment to suffer plaintiffs to recover, and to allow them to buy the land at a sale for certain taxes which had never been paid, although the tenant enjoyed a large income from the land, in order to interpose a tax-title to defeat petitioner's rights.³ Equity will

the possession of the owner of the easement, the latter paying such damages as are due, to be ascertained by account. *Moses v. Sanford*, 2 Lea (Tenn.), 655. A claim for improvements made by tenant in common with knowledge of his co-tenants, entitling him to an assignment of the improved portion of land,—*held*, to give equity jurisdiction to enjoin proceedings before the probate court asking for a sale. *Wilkinson v. Stewart*, 74 Ala. 198.

¹ *McGranighan v. McGranighan*, (Com. Pl.) 19 Pa. Co. Ct. R. 75; 6 Pa. Dist. R. 33. See also *Gunn v. Hardy*, 107 Ala. 609; *Holt v. Pickett*, 111 Ala. 362. Where, in an action to enjoin a suit in ejectment by the holder of the legal title, defendant insists on his right as owner of the fee in severalty by force of such title, and it appears by decree in a third suit, rendered after the ejectment suit was begun, that he only owns a moiety in fee, and is a tenant in common of defendant's landlord as to the balance of the land, a perpetual injunction will be granted. *Zurbrugg v. Reed*, (N. J. Ch.) 35 A. 298.

² *Seiman v. Austin*, 33 Barb. 9. Writ refused though the action in ejectment was barred by the statute of limitations where the plaintiff was an administrator suing on behalf of heirs, one of whom was *non compos*, and the other a *feme covert*. *Fleming v. Collins*, 27 Ga. 494. But it is error not to grant an injunction and make it perpetual where the transaction out of which plaintiff derived title was a mortgage from which defendant in ejectment seeks to redeem and has clearly established his right of redemption. *Harbison v. Haughton*, 41 Ill. 522.

³ *Kendy v. Beatty*, 82 Ga. 669; 10 S. E. 267. An equitable owner of lands in actual possession, and claiming the title in fee simple, can maintain a bill to enjoin a suit in ejectment brought against him by persons claiming under a succession of conveyances given in bad faith and for the purpose of defeating creditors; and in the same bill he can ask for a release of the apparent title held by such claimants. *McKibbin v. Bristol*, 50 Mich. 319.

enjoin a writ of possession against a person in whose favor there is a resulting trust in the land.¹ And in a case otherwise proper, the fact that a portion of one lot of land in possession of complainant was obtained by violence will not prevent equity from affording relief as to the whole tract, including that lot, jurisdiction having attached by reason of the rightful possession of the other portions.² But an action of ejectment will not be enjoined on the ground that defendant's deed, a link in the chain of plaintiff's paper title, was not intended to include the lands in controversy, since the same defence might be made to the action, it further appearing that, should defendant fail on the merits in the injunction suit, he might still defend on the ground of adverse possession at the time of the intermediate conveyances. Another reason is that ejectment deals with the right of possession, which may depend on other things besides title, and so the determination of the title in the injunction suit would not necessarily settle the action of ejectment.³

It has been held that one in the quiet possession of land may have enjoined proceedings to dispossess him to which he has not been made a party.⁴ But in another case it was held that where, in an action of ejectment, a person claiming the premises intervenes, and avers that plaintiff's claim is invalid and unfounded, and is a cloud upon the intervenor's title, this is not sufficient to entitle the intervenor to invoke the aid of a court of equity, and ask an injunction against plaintiff's proceeding in his action at law.⁵ And it was held in New York, under a statute, that a devisee who has brought an action to test the validity of the will

¹ *Ferrin v. Errol*, 59 N. H. 234. Equity will enjoin the execution of a writ of possession in ejectment against a husband, where the wife was not a party and claims the land as her separate estate, leaving the parties to test their titles at law. *Bushong v. Rector*, 32 W. Va. 311; 9 S. C. 225.

² *Pratt v. Kendig*, 128 Ill. 193; 21 N. E. 495.

³ *Bullard v. Bearss*, 51 Hun, 643; 8 N. Y. S. 683. See also as to defence at law to bar relief by injunction, *Byrne v. Browne*, 23 So. 877. Equity cannot enjoin an ejectment suit by one on whose land another has innocently encroached, owing to the mistake of a surveyor employed by defendant in ejectment suit to ascertain the line. *Kirchner v. Miller*, 39 N. J. Eq. 355.

⁴ *Deans v. Bowden*, 20 Fla. 905.

⁵ *Reay v. Butler*, 69 Cal. 572; 11 P. 463. In a bill for an injunction to stay proceedings in ejectment, the staleness of the defendant's claim, which he is enforcing at law, is no ground for continuing an injunction on his proceedings therein; it is a complainant's claim to which the equitable defence of a stale claim is applicable. *Horner v. Jobs*, 13 N. J. Eq. (2 Beas.) 19.

under which he claimed in fee, lands of which he and those claiming under him were in possession, could not enjoin an heir of the testator from proceeding in a similar action.¹

§ 63. **Suits for Partition.** — The jurisdiction is sometimes exercised to restrain proceedings for the partition of land held by tenancy in common. An injunction was granted where a bill to quiet title was filed, showing that complainant was in possession of the land described, with other allegations sufficient to entitle him to the relief claimed, and afterwards defendants filed a bill for the partition of the same lands, to which the complainant in the first bill was not made a party; but the injunction was only continued until the determination of the suit to quiet title.² So an executor, being defendant in a suit for partition and accounting, brought by one claiming as residuary devisee, and who was unaware of any other claimant, prior to the institution of proceedings in escheat, may be enjoined from prosecuting a suit for partition and division subsequently brought by himself against the escheator in which he has admitted the liability of said devisee's interest to escheat.³

§ 64. **Actions involving Mortgages.** — An injunction will be granted on application of a mortgagor who has satisfied the mortgage, and afterwards conveyed with covenants of warranty to restrain a writ by the mortgagee to foreclose; and he is not bound to wait until a suit has been brought upon his covenants for title, and then interpose his defence.⁴ So where a bond secured by

¹ *Anderson v. Appleton*, 1 N. Y. S. 319. Such devisee cannot maintain his action under Code Civ. Pro. N. Y. 1866, which provides that the construction or effect of a devise of real estate may be determined in an action brought for that purpose in like manner as the validity of a deed may be determined, but must wait until a hostile claim is asserted, and set up the devise in opposition thereto.

² *McCullough v. Absecom Land Imp. Co.*, (N. J.) 10 A. 606.

³ *Muir v. Thomson*, 28 S. C. 499; 6 S. E. 309. In an action for recovery of land, defendant asked for an injunction to stay proceedings until a suit pending between plaintiff and certain heirs, for partition, should be decided, defendant having purchased of said heirs their two-thirds undivided interest in the land, after going into possession under purchase from plaintiff; and further, if the land should be allotted to these heirs, that plaintiff be perpetually enjoined. It did not fully appear what issues were involved in the partition suit, nor that the other heirs would recover the whole of the land, but it was admitted that defendant was not a party to that suit. *Held*, that the injunction was properly refused. *Hammers v. Hanrick*, 69 Tex. 412; 7 S. W. 345.

⁴ *Hubbard v. Jasiriski*, 46 Ill. 160. See also *Fisher v. Hartman*, 30 A. 513; 165 Pa. St. 16. Where A. purchased certain land and gave a mortgage

mortgage provided that the principal should, at the option of the obligee, become due upon default in the payment of interest for a given time, a parol waiver of the forfeiture will justify an injunction against its enforcement.¹ But the foreclosure of a mortgage by bill in equity will not be enjoined at the mortgagor's instance merely to enable him to set off claims against the mortgagee of a purely legal character, there being no allegation of insolvency, or of facts showing the inadequacy of the legal remedy.²

A mortgagor's wife, to whom the mortgagee has delivered the mortgage and evidence of indebtedness as a gift, without executing a written assignment thereof, has not the legal title to the mortgage, and she cannot enjoin the purchaser of the land under foreclosure proceedings instituted by the mortgagee's executor from maintaining ejectment against the mortgagor, her husband, her remedy being either a legal action for the recovery of the proceeds of the sale or an equitable action to have it set aside.³

§ 65. **To restrain Threatened Actions on and Transfer of Voidable Notes and Bonds.** — This branch of equitable jurisdiction is frequently exercised in cases involving negotiable instruments.⁴ It back, and was subsequently sued by parties claiming a paramount title, — *held*, that equity would enjoin a suit to foreclose until the question of title had been settled. (Overruling *Strong v. Downing*, 34 Ind. 300.) *Fehrle v. Turner*, 77 Ind. 530.

¹ *Bell v. Romaine*, 3 Stewart, 234. Where trustees of a corporation, intending to bind the corporate property only, give a mortgage bond, which, in law, binds themselves, equity will enjoin an action against them on the bond. *Mapes v. Cooper*, 39 N. J. Eq. 816.

² *Knight v. Drane*, 77 Ala. 371. To same effect, *Waymire v. San Francisco & S. M. Ry. Co.*, (Cal.) 44 P. 1086. In a suit by mortgagors to restrain the sale of lands comprised in a deed of trust given by them to a trustee for their vendor, who had since become insolvent, to secure a balance of the purchase-money thereof, they claimed credit, as against such balance, for damages for the cutting of timber upon the land. *Held*, that the cutting was a mere trespass, the subject of an action at law, and that not even the insolvency of the vendor, or the fact, if true, that he had himself been guilty of the trespass, would confer jurisdiction upon a court of equity. *Cleaver v. Mathews*, 83 Va. 801; 3 S. E. 439. An action was brought in the superior court to recover the amount of interest coupons upon bonds secured by a trust mortgage. Pending said suit, the trustees commenced an action in the supreme court to foreclose the mortgage for the benefit of all the bondholders, who, including the plaintiff in the former suit, were made parties. It was held that the supreme court in its discretion might stay the suit in the superior court until the determination of the foreclosure suit. *Cushman v. Leland*, 83 N. Y. 652.

³ *O'Connor v. McHugh*, 89 Ala. 531; 7 So. 749.

⁴ Subject of transfers fully considered, *infra*, chap. X.

often occurs that want or failure of consideration constitutes an equitable defence, and yet according to the rigid rules of law will not be entertained as a defence in a legal tribunal. Especially is this true when at law a note or other negotiable instrument, though without consideration, is valid upon its face. In such cases the necessity for granting the relief consists in the fact that the evidence upon which the equitable defence is based is *dehors* the instrument, and such defence is not apparent on its face, and might fail through lapse of time, or be lost by reason of such instrument coming into the hands of an innocent purchaser for value.¹ An action on a negotiable instrument will not be enjoined where its illegality is apparent upon its face.² Nor will an action against the maker of a note be enjoined on the ground that the original holder has not complied with the contract out of which the note sued on arose, unless it appears that the original holder is unable to respond to a judgment for the damages resulting from his default.³ But where great hardship and injustice would result from allowing them to be negotiated and suits brought thereon, equity will restrain actions being brought upon negotiable instruments and their transfer, regardless of the question whether or not a good defence to the same exists at law.⁴ On the same

¹ *Bromley v. Holland*, 5 Ves. 617; *Anthony v. Valentine*, 130 Mass. 119; *Hayward v. Dimsdale*, 17 Ves. 111; *Commercial Bank v. Cabell*, 82 S. E. 53; *Reese v. Reese*, 15 S. E. 846; 89 Ga. 645; *Aron v. Chaffe*, (Miss.) 17 So. 11. See also *Bell v. Gamble*, 9 Humph. 117, where an injunction was granted to restrain the collection of a note executed and delivered with the understanding that it should not be enforced, though in the hands of the administrator of payee. Equity will enjoin the enforcement of a note and mortgage, at the instance of a widow who was induced to execute them by threats to prosecute her son for crime. *Turley v. Edwards*, 18 Mo. App. 676. But where plaintiff sought to enjoin the collection of a note on the ground of fraud and mistake, alleging that the real debt was much less than the amount of the note, that the note in suit was the renewal of another, and frequently, and only a short time before the plaintiff instituted his suit, he had made promises to pay, and had acknowledged the justness and correctness of the debt represented by the note, and the answer denied the allegation of fraud, it was held that the complaint was properly dismissed. *Rogers v. Stokes*, 3 Pickle, (Tenn.) 294; 11 S. W. 215.

² *Gray v. Mathis*, 5 Ves. 286. Otherwise where illegality can only be shown by evidence *dehors* the instrument. *Bromley v. Holland*, 5 Ves. 617.

³ *Staten Island Dyeing Establishment v. Skinner Engine Co.*, 26 N. Y. S. 1100; 75 Hun, 116.

⁴ *Ferguson v. Fisk*, 28 Conn. 501. In this case a draft had been delivered upon a consideration which had entirely failed, and an injunction was granted on the ground that being still transferable complainant might be greatly

principle, where equitable defences exist in favor of a surety upon an official bond not available at law, equity will restrain the prosecution of a suit against him on the bond.¹ And where one partner sells to another his interest in the copartnership property there is such an implied warranty of title that, if creditors of the firm afterwards levy upon and sell the property, a court of equity will enjoin the partner to whom a note was given for the purchase-money from prosecuting an action for its collection.² In further illustration of this principle a suit on a promissory note given in exchange for an interest in certain other notes which had been obtained through fraudulent representations in the sale of patent rights was held to have been properly enjoined.³ But where negotiable promissory notes have passed by indorsement into the hands of innocent parties, an injunction against suits for their collection is not warranted.⁴ But the action upon a bond for the conveyance of real estate was enjoined where it appeared that at the time of the execution of the bond the obligee had no title to convey, such contract being treated in equity as unexecuted until the obligor received that for which he contracted.⁵

harassed by a transferrer without notice. See also *Carswell v. Macon*, 38 Ga. 403, where a temporary injunction was granted to restrain suit upon a note upon the ground that the property which was the consideration for the note had been forfeited to the government by the vendor's acts before the sale which was the consideration for the note. In the case of a negotiable note given without consideration and upon an agreement that it should be surrendered to the maker upon the happening of a certain contingency which had happened, pending an action at law upon such note an injunction was granted against the payee who had brought suit against the personal representatives of the maker of the note. *Metler's Admr. v. Metler*, 3 C. E. Green, 270; s. c. 4 C. E. Green, 457.

¹ *Penn v. Ingles*, 82 Va. 65. On the same principle equity will enjoin a defendant from interposing an inequitable defence at law. *Dodd v. Wilson*, 4 Del. Ch. 399. An injunction was granted to restrain actions upon promissory notes which had fraudulently come into the hands of a party. *Lannes v. Courege*, 31 La. An. 74.

² *Hough v. Chaffin*, 4 Sneed, (Tenn.) 288. For a case of complicated facts in which an injunction was refused against the collection of a note given to a bank secured by collaterals to which there were several claimants engaged in litigating their respective titles thereto. See *Koehler v. Farmers' & Drovers' Nat. Bank*, 51 Hun, 418; 4 N. Y. S. 232.

³ *Sackett v. Hillhouse*, 5 Day, 551. So where a person of weak intellect, being unduly influenced, executed a note, it was held sufficient ground for restraining a suit upon the note by injunction. *Rembert v. Brown*, 17 Ala. 677.

⁴ *Dougherty v. Scudder*, 2 C. E. Green, 248.

⁵ *Dorsey v. Hobbs*, 10 Md. 412. But the authority of this case may well

§ 66. **Actions between Landlord and Tenant.** — Courts of equity are averse to interfering in suits between landlord and tenant, either for recovery of rents or for possession of the demised premises.¹ A court of equity will not interfere where the matter claimed by a tenant as a ground for relief is available as a defence at law; as where the landlord had distrained for rent which the tenant claimed had been fully paid;² or where the landlord had agreed that the tenant should have the premises for another year.³ So it was held an injunction should not be granted to restrain an action at law by a lessor to recover possession from his lessee from year to year, on the ground that the lessee had made valuable improvements which would be lost to him in case he were dispossessed.⁴ And where plaintiff seeks to restrain summary proceedings in ejectment before a justice on the ground that by the terms of an alleged oral modification of the lease, partly executed, plaintiff has incurred no forfeiture, and defendants deny all the material allegations of the complaint and affidavits in support thereof, the court will not interfere.⁵ But, in an action by a tenant against his landlord upon a covenant to repair and protect the premises, for specific performance, the landlord was enjoined from prosecuting a statutory proceeding to dispossess the tenant and to annul the lease upon the ground that the law afforded the tenant no adequate remedy.⁶

§ 67. **Actions of Forcible Entry and Detainer.** — To entitle a complainant to an injunction against an action of forcible entry and detainer he must show, in addition to a clear right in himself, that a refusal of the relief would result in irreparable injury. He must show that he has not come into possession through his own wrong; in other words, he must come into court with clean hands.⁷ And it must appear that complainant has not an ade-

be questioned, as in such case, there being an entire want of consideration, there is a good defence available at law.

¹ *Banks v. Busey*, 34 Md. 437; *Leeds v. Cheetham*, 1 Sim. 146; *Phillips v. Jones*, 9 Sim. 519, *Rapp v. Williams*, 1 Hun, 716, s. c. 4 *Thomp. & C.* 174.

² *Banks v. Busey*, 34 Md. 437.

³ *Rapp v. Williams*, 1 Hun, 716.

⁴ *West v. Flannagan*, 4 Md. 36.

⁵ *Johnston v. Mortimer*, 5 N. Y. S. 381. The relief granted to restrain action before justice of the peace on ground of preventing multiplicity of suits. *Damschroeder v. Thias*, 51 Mo. 100.

⁶ *Valloton v. Seignett*, 2 Abb. Pr. 121. See *Haynes v. Union Invest. Co.*, 53 N. W. 979; 35 Neb. 766.

⁷ *Crawford v. Paine*, 19 Iowa, 172; *Lamb v. Drew*, 20 Iowa, 15. In the

quate defence at law, otherwise relief will be denied.¹ But an injunction will lie to restrain summary proceedings for forcible entry and detainer, when void for want of jurisdiction, and when no final order has been entered.² And where a landlord's title has been purchased on execution sale, the purchaser is entitled to an injunction against the prosecution of a forcible entry and detainer suit by such landlord against a tenant, who, since the execution sale, has attorned to the purchaser, the landlord being insolvent.³

§ 68. **Actions by and against Infants.** — Where two persons, each claiming to represent as next friend an infant, are prosecuting an action in his name and for his benefit, a court of equity will, upon proper application, determine which has the best claim to represent him, and then enjoin the action brought by the other.⁴ But an injunction was refused where sought to restrain an action in ejectment, the only ground urged for it being that the plaintiff in the ejectment suit had made sale of the premises while an infant, but after attaining his majority had refused to ratify it, although the purchase-money had been paid.⁵

§ 69. **Actions on Usurious Contracts ; Gambling Debts ; Catching Bargains.** — Where an injunction is sought to restrain proceedings upon a usurious contract, the court will strictly enforce the rule that he who seeks equity must do equity, and will only grant an injunction upon the condition that the petitioner shall first offer to pay the amount lawfully due upon the contract.⁶ Where a bill was filed to redeem certain collateral securities which had been deposited as security for certain usurious loans, an injunction was granted to restrain the enforcement of the usurious contract by

last case it was said that the relief would not be granted in the absence of fraud, mistake, accident, or surprise.

¹ *Womack v. Powers*, 50 Ala. 5. See also *Green v. Morse*, (Neb.) 77 N. W. 925. Plaintiff in a suit to quiet title cannot enjoin defendant from bringing an action at law against him for forcible entry and detainer of the premises in question. *Northern Pac. R. Co. v. Cannon*, (Cir. Ct.) 49 F. 517.

² *Schneider v. Leitzman*, 57 Hun, 561; 11 N. Y. S. 434.

³ *Texas Land Co. v. Turman*, 58 Texas, 619.

⁴ *Morrison v. Bell*, 5 Ir. Eq. 354.

⁵ *Browner v. Franklin*, 4 Gill, 463.

⁶ *Rogers v. Rathbun*, 1 Johns. Ch. 367; *Fanning v. Dunbar*, 5 Johns. Ch. 122; *Morgan v. Schemerhorn*, 1 Paige, 544; *Miller v. Ford*, Saxt. 358. And the amount actually due together with lawful interest must be produced in court. *Rogers v. Rathbun*, 1 Johns. Ch. 367.

sale of the securities.¹ On the same principle actions upon bills of exchange obtained unconscionably from expectant heirs will be enjoined upon payment of the amount actually and fairly due.² Actions upon gambling contracts will also be enjoined.³

§ 70. **Actions against Receivers.** — An important branch of the jurisdiction to restrain actions at law pertains to the protection of receivers in the possession and control of property intrusted to them, and litigation connected with their trusts. Courts of equity incline to be very jealous in protecting their officers from unauthorized litigation, and will not permit receivers appointed by them to be sued without leave first obtained from the court appointing the receiver; ⁴ and an action brought against a receiver without leave of court will be enjoined by the court having jurisdiction over the receiver and the fund in his hands.⁵ Nor is the right of a receiver to an injunction affected by the fact that the party prosecuting the action has a clear right to property in the former's possession, since the court appointing him possesses ample jurisdiction to pass upon his rights.⁶ Nor is it important that the right for the enforcement of which the action is brought against the receiver is one given by statute.⁷ But where the matter upon which suit has been brought against a receiver has been already passed upon by the court appointing him, such an adjudication constitutes a complete defence in his favor, and he will be left to interpose such defence, and will not be granted an injunction against the party prosecuting the action.⁸

¹ *Binford v. Boardman*, 44 Iowa, 53.

² *Earl of Aylesford v. Morris*, L. R. 8 Ch. 484.

³ *Earl of Milltown v. Stewart*, 2 Myl. & Cr. 18.

⁴ *Taylor v. Baldwin*, 14 Abb. Pr. 166; *Miller v. Loeb*, 64 Barb. 454; *Randfield v. Randfield*, 3 De G. F. & J. 766, reversing s. c. 1 Dr. & Sm. 310. See also *De Groot v. Jay*, 30 Barb. 215; s. c. 9 Abb. Pr. 364.

⁵ *Evelyn v. Lewis*, 3 Hare, 472; *In re Persee*, 8 Ir. Eq. 111; *Parr v. Bell*, 9 Ir. Eq. 55; *Tink v. Rundell*, 10 Beav. 318; *Pike v. Wasserman*, (Sup.) 30 N. Y. S. 952; 81 Hun, 78. An injunction will lie against distress for rent of lands in the possession of the receiver of the court, title thereto being in litigation. *Marshall v. Lockett*, 76 Ga. 289.

⁶ *Parr v. Bell*, 9 Ir. Eq. 55; *Evelyn v. Lewis*, 3 Hare, 472.

⁷ *Tink v. Rundell*, 10 Beav. 318, where condemnation proceedings begun against property in the hands of a receiver were restrained.

⁸ *Jay's Case*, 6 Abb. Pr. 293. The receiver of the property of a combination known as the "Sugar Trust" moved for an injunction, alleging that the trustees were about to convey or dispose of the trust property. This allegation was unequivocally denied by the trustees. *Held*, in view of the pecuniary responsibility of the trustees, and of the fact that an appeal is pending from the

§ 71. **Interference with Criminal Prosecutions.** — The rule of non-interference to prevent crime and preserve morality has been previously discussed;¹ but it cannot be amiss to give brief attention in this place to some important illustrations of the rule, and distinctions to be observed in applying it. The rule applies to suits prosecuted for violation of municipal ordinances, and courts of equity will not interfere by injunction to restrain such prosecutions since they are regarded as at least *quasi* criminal.² It was held, however, that where municipal authorities unlawfully

decision declaring the trust unlawful, which appeal will probably be decided shortly, the receiver's motion would be denied, with leave, however, to renew his motion on ascertaining additional facts showing an intent by the trustees to convey the property, or an affirmance of the decision appealed from. *Gray v. De Castro*, 23 Abb. N. C. 314; 8 N. Y. S. 237. Other courts of equity than that by which a receiver was appointed will not enjoin the receiver from prosecuting actions concerning his trust. A party aggrieved by the misconduct of the receiver should apply for relief to the court by which he was appointed, rather than seek to enjoin him by a separate action. *Smith v. Earl of Effingham*, 2 Beav. 232; *Winfield v. Bacon*, 24 Barb. 154.

¹ *Supra*, § 24. See also *New Home Sewing Machine Co. v. Fletcher*, 44 Ark. 139; *Pueblo & A. V. R. Co. v. Board of Com'rs of Prowers County*, (Colo. App.) 38 P. 112; *Kenny v. Martin*, (Super. N. Y.) 32 N. Y. S. 1087; *Suess v. Noble*, 31 F. 855; *Garrison v. Atlanta*, 68 Ga. 64; *Murphy v. New York Police Board*, 11 Abb. (N. Y.) N. Cas. 337; *Waters Bierce Oil Co. v. Little Rock*, 39 Ark. 412; *Washington & G. R. Co. v. District of Columbia*, 6 Mackey, 570; *Chisholm v. Adams*, 71 Tex. 678; 10 S. W. 336; *Saull v. Browne*, L. R. 10 Ch. 64; *Kerr v. Corporation of Preston*, 6 Ch. Div. 463; *Montague v. Dudman*, 2 Ves. Sen. 396; *Phillips v. Stone Mountain*, 61 Ga. 386; *Gualt v. Wallace*, 53 Ga. 675; 2 Story's Equity Jurisprudence (12th ed.), 893; *Bispham's Prin. Equity*, 424; *Portis v. Fall*, 34 Ark. 375. Compare *Mayor of New York v. Pilkington*, 2 Atk. 302; *Turner v. Turner*, 15 Jur. 218; *Cope v. District Fair Ass'n*, 99 Ill. 489; s. c. 39 Am. Rep. 30; *Sparhawk v. Union, etc. Co.*, 54 Pa. St. 401. Complainants' bill for injunction, filed in the circuit court of the United States, alleged that they were the agents of liquor dealers living in another state, and, as such, were engaged in selling in Kansas liquors in the original packages in which they were imported by their principals; that by civil and criminal proceedings under the prohibitory law of Kansas defendants were seeking to break up and destroy complainants' business, in violation of their rights under the federal constitution; and it prayed that they be restrained from further proceedings in the premises. *Held*, that the proceedings instituted by defendants being criminal in their nature, a court of equity had no jurisdiction to restrain them by injunction. *Hemsley v. Myers*, 45 F. 283.

² *Moses v. Mayor, etc.*, 52 Ala. 198; *Taylor v. Pine Bluff*, 34 Ark. 603; *Phillips v. Mayor*, 61 Ga. 386; *Poyer v. Village of Desplaines*, 123 Ill. 111; 13 N. E. 819; *Kansas City Cable Ry. Co. v. City of Kansas*, 29 Mo. App. 89. The validity of the ordinance can only be tested by appeal from a fine imposed under it. *Skakel v. Roche*, 27 Ill. App. 423.

threaten to arrest, in executing a Sunday law, a work of necessity, they might be restrained by injunction.¹ But a court of equity will not enjoin officers from making arrests under a statute providing penalties for cruelty to animals, upon a bill alleging injury resulting to plaintiff's business.² Even though such court has already jurisdiction of the parties and the subject-matter concerning which the criminal action is instituted, it will not entertain a bill to enjoin the plaintiff in the suit from prosecuting criminally concerning the same subject-matter.³ Nor where the criminal prosecution affects property rights to the extent of the threatened injury to such rights, but no further, will a court of equity enjoin the proceeding.⁴ But where plaintiff had been arrested fifteen times under a city ordinance for occupying a highway, to which he claimed title, and fined in each case an amount too small to allow an appeal, it was held an injunction would lie to prevent any further prosecutions until the question of title was determined.⁵ And though a court of equity has no jurisdiction to enjoin purely criminal proceedings, injunction will lie from a federal court against proceedings by a prosecuting attorney to prevent the agents of a non-resident importer from selling intoxicating liquors in the original packages in which they were imported, under a state law, which, in so far as it prohibits such sales, is in violation of the interstate commerce clause of the federal constitution, since such proceedings are an interference with complainant's property rights under the constitution, for which, as provided by Rev. St. U. S. 1979, an action at law or suit in

¹ *Manhattan Iron Works Co. v. French*, 12 Abb. (N. Y.) N. Cas. 446.

² *Davis v. Am. Soc.*, 75 N. Y. 362.

³ *Saull v. Browne*, L. R. 10 Ch. 64; *Holderstaff v. Saunders*, 6 Mod. 16. In *Montague v. Dudman*, 2 Ves. Sr. 896, a demurrer was sustained to a bill asking an injunction to restrain proceedings by injunction. A different rule seems to prevail in federal courts. See *Spink v. Francis*, 19 Fed. Rep. 670; s. c. 20 Fed. Rep. 567.

⁴ *City of Atlanta v. Gate C. G. L. Co.*, 71 Ga. 106.

⁵ *Shinkle v. City of Covington*, 83 Ky. 420. A city which, by ordinance, requires a ditch constructed through lands embraced within the public domain of the United States, prior to such lands being embraced within the city limits, to be so confined and reconstructed, by fluming or otherwise, as to prevent washing and cutting away of property along the line of the ditch, may be enjoined from prosecuting the owner of such ditch for the violation of such an ordinance, such prosecution tending to impair vested rights, and inflict irreparable injury without authority of law. *Platte & D. Canal & Milling Co. v. Lee*, (Colo. App.) 29 P. 1036.

equity may be maintained.¹ Nor does the rule against interference with criminal prosecutions apply where, without such interference, the jurisdiction of the equity court would be invaded and its process rendered nugatory.²

§ 72. **Attachment Proceedings.** — An injunction will be granted to protect creditors in a foreign attachment who are entitled to a priority of claim over creditors-attaching subsequently.³ But a bill in equity by one of a firm to restrain a creditor of the firm from prosecuting an action at law begun by him, in which an attachment has been had, and praying that he may be compelled to prove his claim in proceedings for the winding up of partnership affairs, the bill also making the plaintiff's copartner a defendant, and praying for a dissolution, is demurrable by such creditor.⁴

§ 73. **Condemnation Proceedings.** — The constitutional inhibition against taking private property for public purposes without just and adequate compensation being first paid, does not constrain the granting of an *ad interim* injunction in favor of the owner of the fee against the appropriator who is endeavoring to avoid such inhibition. Where there is an apparently *bona fide* claim on the part of a railroad company to a right of way in dispute, whether

¹ Schandler Bottling Co. v. Welch, 42 F. 561.

² Wadley v. Blount, (C. C.) 65 F. 667.

³ Erskine v. Staley, 12 Leigh, 406; Moore v. Holt, 10 Grat. 284. But attachment proceedings will not be restrained upon application of one not a party to the litigation where no prejudice likely to result to him from the attachment suit is shown. Williams v. Stewart, 56 Ga. 663. See Gay v. Strickland, (Ala.) 20 So. 919; 112 Ala. 567. In Dungan v. Miller, 4 C. E. Green, 218, an injunction was held properly refused, a non-resident defendant basing his application on the ground that the amount was so large that he could not give the bond necessary to dissolve the attachment, whereby he was deprived of an opportunity to avail himself of a set-off to the action.

⁴ Fielding v. Lucas, 60 How. (N. Y.) Pr. 134; s. c. 22 Hun (N. Y.), 22. When an attachment has issued against a non-resident, and has been permitted by the court of chancery to be levied on funds belonging to the debtor in the hands of the receiver of an insolvent corporation, and a bill had been filed by the attaching creditor setting up an assignment by the defendant in attachment of all his property for the benefit of his creditors, and asserting that such assignment was fraudulent and void as to creditors who are citizens of New Jersey, because it gave preferences, and praying that it might be so decreed, and that the receiver directed to pay the funds due on said claim to the auditor in the attachment suit, and for an injunction against payment to any other person, it was held that an injunction *pendente lite* is unnecessary and inappropriate, because the attachment binds the funds in the hands of the receiver as garnishee, if complainant's claim shall be sustained. Kimball v. Lee, 43 N. J. E. 277; 10 A. 286; Schindelholz v. Cullum, (C. C. A.) 55 F. 885.

the claim, if well founded, would amount to a legal title in the company, or to a mere license from another company having such title, a court of equity has discretionary power to either grant or refuse an injunction.¹ But where the appropriation threatens injuriously public interests, as where if carried out it will interfere with navigation on a navigable river, an injunction will issue, regardless of the merits of the dispute between the parties.²

§ 74. **To prevent Plea of Statute of Limitations — Postponement of Trial.** — In the absence of fraudulent abuse of the right to plead the statute of limitations, such as a contract or stipulation to the effect that delay in bringing the suit shall be without prejudice, the right to plead the statute of limitations will not be enjoined.³ Equity will not restrain one sued at law from pleading the bar of the statute of limitations, because plaintiff erroneously supposed himself to be enjoined from suing earlier, plaintiff's mistake not having been superinduced by word or act of defendant.⁴ Nor can equity be invoked to enjoin the plea of the statute of limitations to an action at law, where it appears that time has run against a claim by reason of a former action having been misconceived by the complainant, or where the former

¹ *Davis v. Covington & M. R. Co.*, 77 Ga. 322; 2 S. E. 555; *Harvey v. Kansas, N. & D. Ry. Co.*, 45 Kan. 228; 25 P. 578.

² *Pacific Mut. Tel. Co. v. Chicago & Atchison Bridge Co.*, (Kan.) 12 P. 560. In Minnesota an injunction will not be granted to restrain the condemnation by a railroad of a right of way through university lots, on the ground that they had been appropriated by the state for the use of the university, where it appears that, pursuant to the recommendation of the professor of agriculture, the executive committee purchased the lots without the direct authority of the Board of Regents, taking title in the name of one of their number, and that this action had not been ratified by the regents, and that both the state and the holder of the legal title had been parties to the condemnation proceedings, though the university had not. *University of Minnesota v. St. Paul & N. P. Ry. Co.*, 36 Minn. 447; 31 N. W. 936. This subject fully considered *infra*, chap. iv. subd. v.

³ *Bank v. Hill*, 10 Humph. 176; *Andrae v. Redfield*, 12 Blatch. 407. A. was enjoined, pending his suit in equity against B. and C. for the specific performance of a contract, from prosecuting his pending action at law for damages for its breach. The suit in equity was stricken finally from the files of the court, and A. discontinued his action at law, and brought another one against the devisees of B., then deceased. It was held that defendants should not be enjoined from setting up the statute of limitations, there being no promise or fraudulent conduct chargeable to them by which the delay was caused. (Reversing *Lamb v. Ryan*, 40 N. J. Eq. 67.) *Martin v. Lamb*, 40 N. J. Eq. 669.

⁴ *Chilton v. Scruggs*, 6 Lea (Tenn.), 308.

action has failed in its object on account of a change in the condition of the defendants during its pendency, or by reason of a nonsuit resulting from a failure to prove some material thing at the trial.¹ But the jurisdiction of courts of equity under certain circumstances to enjoin a defendant in an action at law from using the statute of limitations fraudulently, even where the cause of action upon which the action at law is based did not arise out of a fraudulent act, is still recognized by the courts of some states.²

The granting and refusal of applications for continuances and postponements of trials are matters resting largely in the discretion of the courts to which such applications are made. Therefore equity will not interfere to enjoin proceedings in a court of law because of its refusal to postpone the trial.³

§ 75. **Garnishment — Arbitration Proceedings.** — Garnishees come within the meaning of a statute providing for injunctions against defendants in certain cases.⁴ To warrant an injunction against a garnishee before trial at law to restrain him from disposing of the debtor's property in his hands, complainant must show the garnishee's insolvency or other grounds for fearing a loss.⁵

Where arbitrators have improperly conducted themselves equity will enjoin a suit upon the award made by them as a result of such improper conduct.⁶ Arbitrators will be enjoined from acting as such on the ground of partiality; and a court of equity in passing upon an application for an injunction on this ground will judge from all the circumstances whether the arbitrator against whom the injunction is sought is a fit and proper person to act.⁷

§ 76. **When Relief granted without Original Application.** — Where an action at law is begun pending proceedings in a court of

¹ *Martin v. Lamb*, 40 N. J. Eq. 669; 5 A. 153.

² See *Holloway v. Appelget*, 40 A. 27; 55 N. J. Eq. 588.

³ *Hamilton v. Dobbs*, 4 C. E. Green, 227.

⁴ *Malley v. Altman*, 14 Wis. 22; *Almy v. Platt*, 16 Wis. 169. Injunction will lie to restrain a resident of the state from collecting from another resident, by means of garnishment proceedings in another state, wages exempt by the laws of the state of their residence. *Griggs v. Doctor*, 61 N. W. 761; 89 Wis. 161; *Kelly v. Siefert*, 71 Mo. App. 143.

⁵ *Bigelow v. Andress*, 31 Ill. 322.

⁶ *Cliland v. Hedley*, 5 R. I. 163.

⁷ *Beddow v. Beddow*, 9 Ch. D. 89.

equity possessing full jurisdiction and complete power to furnish redress, an injunction will be granted by the latter upon a motion, and without an original application restraining the party from proceeding at law.¹ But an action at law will not be enjoined on the ground that a suit in equity is pending in another state, even though the parties in both proceedings are identical.²

An original bill is unnecessarily filed where a suit in equity is already pending in which the same relief may be had; and by an extension of the rule just stated, if a bill for an injunction against an action at law discloses the pendency of a prior suit in equity pertaining to the same subject-matter in which the relief sought in the new suit might have been obtained by motion or petition in the cause, an injunction should not be granted in the new suit, and if already granted, should be dissolved.³ But there is no doubt of the right of a court of equity to grant an injunction where by its record it appears that another suit in equity is pending in the same court involving the same subject-matter and the same parties.⁴

§ 77. **Court may interpose Conditions to granting Relief.** — A party seeking an injunction in equity against proceedings at law is generally required to confess such judgment in the action at law as the party prosecuting such action is entitled to as a condition upon which relief by injunction is granted.⁵ To do this is only meeting a requirement of courts of equity, long established, to the effect that a party resorting to equity for substantive relief must submit himself entirely and without reserve to

¹ *Wilson v. Wetherherd*, 2 Meriv. 406.

² *Ins. Co. v. Brune's Assignee*, 6 Otto, 588.

³ *Washington v. Emery*, 4 Jones Eq. 29.

⁴ *Mann v. Flower*, 26 Minn. 479; *Alspaugh v. Adams*, 80 Ga. 345; 5 S. E. 496; *Bond v. Greenwald*, 7 Baxter (Tenn.), 466. See *Jenkins v. Jenkins*, (Ga.) 11 S. E. 608.

⁵ *Warwick v. Norvell*, 1 Leigh, 96; *Chadwell v. Jordan*, 2 Tenn. Ch. 635; *Mathews v. Douglas, Cooke* (Tenn.), 136; *Conway v. Ellison*, 14 Ark. 360; *Nelson v. Owen*, 3 Ired. Eq. 175. Other cases on the subject of the imposition of conditions are *Pennsylvania Co. v. Philadelphia Nat. Bank*, (Pa. Com. Pl.) 14 Pa. Co. Ct. R. 193; *Texas & P. Ry. Co. v. Kuteman*, 4 C. C. A. 503; 13 U. S. App. 99; *Thorndike v. Thorndike*, 142 Ill. 450; *Town of Westminster v. Willard*, 65 Vt. 266; *German Sav. Bank v. Friend*, 61 N. Y. Super. Ct. 400; *Chase's Ex'rs v. Chase*, 50 N. J. Eq. 143; *Gulf, C. & S. F. Ry. Co. v. Bacon*, 3 Tex. Civ. App. 55; *New York Security & Trust Co. v. Blydenstein*, 70 Hun, 216; *Aleck v. Jackson*, 49 N. J. Eq. 507.

the jurisdiction of the chancellor.¹ But the requirement that a party seeking an injunction to restrain proceedings at law shall first confess judgment rests in the discretion of the court to which the application is made. The discretion to impose the condition will be exercised according to the circumstances of the case. The object of the requirement is to protect the legal and equitable rights of the party sought to be enjoined, and at the same time obtain for the petitioner the relief to which he is entitled. And where a confession of judgment would endanger the rights of the party seeking relief, or where he wholly denies the right of the opposite party to any judgment whatever, the condition should not be imposed. In the event the confession of judgment is required, it should be upon the condition that such judgment shall remain subject to the control and discretion of the court granting the relief by injunction.²

Where plaintiff in an action at law seeks an injunction against a defendant making a defence to the action, the injunction should not be granted except upon condition that the plaintiff proceed no further with his action.³

§ 78. **Same Subject.** — One having a substantial claim to equitable relief aside from his defence at law need not abandon his defence by confessing judgment as a condition to obtaining an injunction to restrain the suit at law.⁴ But if a bill to enjoin the prosecution of an ejectment suit, and to transfer the litigation to the chancery court, shows grounds of equitable jurisdiction, the court, nevertheless, will only grant the injunction and take jurisdiction on condition that defendant in ejectment

¹ *Warwick v. Norvell*, 1 Leigh, 96.

² *Great Falls Mfg. Co. v. Henry's Admr.*, 25 Grat. 575. Where a judgment has been confessed as a condition to granting an injunction, which is subsequently dissolved, the dissolution should be upon condition that the party in whose favor judgment was confessed withdraw it, and allow the issues to be tried upon their merits. *Great Falls Mfg. Co. v. Henry's Admr.*, 25 Grat. 575; *Hooper v. Cook*, 25 L. J. Ch. 467; s. c. 2 Jur. n. s. 527.

³ *Jones v. Ramsey*, 3 Bradw. 303. A temporary injunction procured in an interpleader proceeding to restrain a party from prosecuting an action to recover a deposit, to whom costs of an appeal from an order had been awarded, — *held*, not to prohibit the collection of costs. (Reversing s. c. 45 N. Y. Super. Ct. 615.) *German Savings Bank v. Habel*, 80 N. Y. 278; s. c. 58 How. (N. Y.) Pr. 336.

⁴ *Warwick v. Norvell*, 1 Rob. (Va.) 308. A party offering in his bill for an injunction to withdraw his defence at law, if otherwise entitled to the relief, is entitled to an injunction. *Ex parte Hodges*, 24 Ark. 197.

will give judgment at law, to be dealt with, however, as the chancery court shall finally order, execution meanwhile to be stayed.¹ On like principle, a court of equity enjoined an action at law based on an alleged irregularity in an order issued by the clerk and master, and executed by a sheriff, but this without prejudice to the rights of the aggrieved party to compensation, in case the order should be adjudged to have been irregular.²

Where a bill for an injunction to restrain an action at law was dismissed for want of merits, and plaintiff in the action proceeded to judgment, from which the defendant appealed, an injunction was granted enjoining him from further prosecuting his appeal, and resisting an affirmance in the supreme court.³ But this case would seem to stretch the jurisdiction to an unreasonable and unwarranted extent.

§ 79. *Effect of granting and dissolving the Writ.* — Whether the granting of an injunction restraining proceedings at law has the effect of suspending the statute of limitations is a question upon which the authorities are not in harmony. It seems to have been the early view of the English court of chancery that the granting of an injunction operated to suspend the statute.⁴ But in New York a contrary view of its effect was taken.⁵

By the dissolution of an injunction restraining an action at law a court of equity loses jurisdiction of the cause and the parties thereto, and the latter may proceed as though no injunction had been issued. Accordingly where the same court which had dissolved an injunction sitting as a court of equity immediately entered up judgment against one of the parties upon the merits of the principal controversy as a court of law, its action was held erroneous.⁶

¹ *Trousdale v. Maxwell*, 6 Lea (Tenn.), 161.

² *Turner v. Breeden*, 2 Lea (Tenn.), 713.

³ *Perkins v. Woodfolk*, 8 Baxter (Tenn.), 411.

⁴ *Anon.*, 2 Cas. in Ch. 217. See also *Little v. Price*, 1 Md. Ch. 182; *Tishimingo Sav. Inst. v. Buchanan*, 60 Miss. 496. The saving of time and expense constitutes no reason for refusing to stay proceedings at law. So held where at the time the injunction was issued the action was at issue and ready for trial. *Hutchinson v. Hutchinson's Exrs.*, 1 Houst. 613.

⁵ *Barker v. Millard*, 16 Wend. 572; *Wilkinson v. First Nat. Ins. Co.*, 72 N. Y. 499, affirming s. c. 9 Hun, 522.

⁶ *Powers v. Waters*, 8 Mo. 299.

CHAPTER III.

AGAINST JUDGMENTS AND EXECUTIONS.

I. GENERAL PRINCIPLES AND LIMITATIONS.

II. ILLUSTRATIONS OF THE JURISDICTION.

A. Direct Relief against Judgment.

B. Against the Execution.

III. PARTIAL AND CONDITIONAL RELIEF.

IV. EFFECT UPON STATUS AND RIGHTS OF PARTIES.

I. GENERAL PRINCIPLES AND LIMITATIONS.

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| <p>§ 80. Stage of Proceedings considered.</p> <p>81. Effect of Statutory Provisions.</p> <p>82. Conflicting Decisions.</p> <p>83. General Principles governing herein.</p> <p>84. Point at which Relief asked unimportant.</p> <p>85. Courts of Equity reluctant to interfere.</p> <p>86. Principles apply to Foreign Judgments.</p> <p>87. Diligence required in applying for Relief.</p> <p>88. Same — Applying for New Trial.</p> <p>89. Same — Making Defence at Law.</p> <p>90. Same — Procuring Evidence.</p> <p>91. Same — Employment and Attendance of Counsel.</p> <p>92. Same — Cross-examination of Witnesses.</p> <p>93. Same — Entering Appearance; Filing Answer; Procuring Record.</p> <p>94. Same — Claiming Set-offs and Credits and Counter-claims.</p> <p>95. Same — Advice and Assurance of others.</p> <p>96. Mere Negligence of Attorney or Agent no Ground for Relief.</p> <p>97. Otherwise where Fraudulent Connivance and Insolvency of Attorney are shown.</p> <p>98. Mistake or Ignorance of Counsel no Ground for Relief.</p> <p>99. Equitable Ground for Relief must be shown.</p> | <p>§ 100. Same — Fraudulent Assignment of Judgment; Payment with Notice of Assignment, etc.</p> <p>101. Same — Illegal Contract; Parties <i>in pari delicto</i>.</p> <p>102. Complainant must offer to do Equity.</p> <p>103. Errors of Trial Court and Mere Irregularities not available.</p> <p>104. Same Subject.</p> <p>105. Remedy at Law directed against the Execution.</p> <p>106. Same — Against the Judgment.</p> <p>107. Same — By Appeal or Writ of Error.</p> <p>108. Same — Diligence in seeking Relief in Appellate Court.</p> <p>109. Same — Judgment in Justice's Court.</p> <p>110. Existence of Legal Remedy no Objection where Injunction ancillary to other Relief.</p> <p>111. Relief refused where Matter urged <i>res adjudicata</i>.</p> <p>112. Same — When Rule applies to Equitable Defences.</p> <p>113. Cases where the Rule does not apply.</p> <p>114. Perjury of Witnesses or Misconduct of Jury.</p> <p>115. Not granted where only Title to Personalty involved.</p> <p>116. Good Defence must be shown.</p> <p>117. Same — No Notice to Defendant; Conflicting Decisions.</p> |
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| <p>§ 118. Substantial Interest must be shown.
119. Same — Creditors ; Fraudulent Assignments.
120. Same — Interests in Real Estate the Subject of Litigation.
121. Resulting Injury must be shown.</p> | <p>§ 122. Same — Interests in Real Estate.
123. Same — Interests of Creditors.
124. Further Illustrations — Infant ; Surety ; Division of Action.
125. Judgments confessed, subject to Ordinary Rules.</p> |
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§ 80. **Stage of Proceedings considered.** — Before judgment, the prevention of a multiplicity of suits and the existence of rules which prevent equitable defences, are the usual grounds upon which legal proceedings are enjoined. Before judgment, fraud, mistake, accident, and surprise are seldom made the basis of an application for relief. But after an action at law has proceeded to judgment, the rights and relations of the parties thereto become considerably altered. The evil of a multiplicity of suits is no longer present or important, except in the single instance of confused and conflicting claims to property taken on execution.¹ There is in all cases, except those in which matters arise after the judgment, and in cases of judgments obtained through fraud and void judgments,² a presumption of negligence, weak or strong, according to the character of the case presented, and based on the fact that application has not been made at an earlier stage of the proceeding. Hence, after judgment, the equitable doctrine of laches becomes of increased importance. Especially is this true in states where both legal and equitable remedies are administered by the same court, and equitable defences are available in connection with legal.

§ 81. **Effect of Statutory Provisions.** — This naturally leads to a consideration of the extent to which the reform legislation of the last few decades has impaired or trenched upon the ancient and original jurisdiction in equity to restrain the enforcement of judgments at law. It is clear that with respect to void judgments obtained through fraud, and in cases where the party was prevented from making his defence by fraud, accident, surprise, or mistake, the time for moving for a new trial on these grounds having passed, and all these being original heads of equitable jurisdiction, courts in the exercise of equity powers, whether the same courts wherein the judgment at law was rendered or separate courts, may still grant relief as fully and with like effect as before the change, in the absence of statutes still further

¹ *Infra*, § 167.

² *Infra*, § 126 *et seq.*

curtailing their powers. With respect to equitable defences not available at law under the strict common-law system, but which may now be made either separately or in connection with legal defences in an action at law, it will require the same showing to obtain equitable relief against the judgment as in the case of a legal defence. In other words, it is not enough simply to show that such equitable defence exists, but it must be shown that for one or more of the reasons before named, the party has been prevented from bringing it forward at the proper time.¹ In a few states still more radical innovations upon this branch of the jurisdiction are made by statute. Thus, in California, it is provided that an injunction cannot be granted "to stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings."² Substantially

¹ *Burton v. Hynson*, 14 Ark. 32. The mere fact that the judgment was recovered on the equity side of the court will not authorize the maintenance of a separate equitable action to set the judgment aside. *Crocker v. Allen*, (S. C.) 13 S. E. 650.

² *Deering's An. Civ. Code*, § 3423. It is the settled law of this state that the prosecution of a suit in one court cannot be enjoined by any other court of co-ordinate jurisdiction. *Wilson v. Baker*, 1 West Coast Rep. 650. Nor can the orders or decrees of one court be restrained by a court of co-ordinate jurisdiction. *Rickets v. Johnson*, 8 Cal. 84; *Hockstocker v. Levy*, 11 Cal. 76; *Uhlfelder v. Levy*, 9 Cal. 607; *Crawley v. Davis*, 37 Cal. 268. The enforcement of a decree of foreclosure entered in violation of a stipulation will not be enjoined in another action; the remedy is in the same action. *Buell v. S. F. Savings Un.*, 3 Cal. 51. The fact that the parties to the injunction proceeding are not the parties to the judgment or decree sought to be enjoined does not relieve a case from the operation of the rule, nor can the consent of parties change the rule or relax its binding force in any particular case. It is not established and enforced so much to protect the rights of parties as to protect the rights of courts of co-ordinate jurisdiction, to avoid conflict of jurisdiction, confusion, and delay in the administration of justice. *Revalk v. Kraemer*, 8 Cal. 71; *Uhlfelder v. Levy*, 9 Cal. 614. Hence, under such system, it does not seem that a state of facts could exist where it would be proper or allowable for one district court to attempt to restrain the execution of a judgment or decree of another district court; proceedings for such purpose should always be instituted in the court rendering the judgment or decree, or having control of its execution. The case of *Pixley v. Huggins*, 15 Cal. 134, does not oppose or tend to modify the rule: *Crawley v. Davis*, 37 Cal. 269; and the rule is recognized and followed in *Flaherty v. Kelly*, 51 Cal. 145; *Judson v. Porter*, Id. 562; in which latter case the enjoining further proceedings in a court of co-ordinate jurisdiction was not allowable. Where suit is pending in one court on a note of defendant, though no summons has been served, and no appearance made, he cannot bring a bill in equity in another court to enjoin the collection of a note or to cancel it, the averment

the same provision, construed similarly, is found in the Kentucky code.¹ But such provisions are exceptional and unusual. Generally the original jurisdiction is left unimpaired, except so far as modifications were necessary to conform to and harmonize with new rules of procedure.²

being simply that he has a good defence to the note. *Smith v. Sparrow*, 18 Cal. 596, citing *King v. Huggins*, 5 Cal. 82; *Lewis v. Tobias*, 10 Cal. 577. But the rule does not apply to a proceeding brought, not to stay execution issued against the property of the judgment debtor, but to prevent a sale of the property of plaintiff under the claim that it is the property of the debtor. *Pixley v. Huggins*, 15 Cal. 128, 134.

¹ Code Ky. § 285, providing that an injunction to stay proceedings under a judgment shall not be granted in an action brought in any other court than that in which the judgment was rendered, applies to any party seeking to stay the judgment. *Mallory v. Dauber's Ex'r*, 83 Ky. 239. The court in which a judgment was rendered alone has jurisdiction to enjoin it. *McConnell v. Raive*, (Ky.) 1 S. W. 582. The Civil Code has changed the mode of procuring an injunction or *supersedeas*; but the force and effect thereof when obtained is not changed or diminished. *Keith v. Wilson*, 3 Metc. (Ky.) 201. A circuit court cannot enjoin a sale under an execution on a judgment rendered by a justice of the peace. *Chesapeake, O. & S. R. Co. v. Reaser*, 84 Ky. 369; 1 S. W. 599.

² In North Carolina this seems to have been taken away as a branch of equitable jurisdiction, and other remedies in the law court are provided, except where an injunction is ancillary to other relief flowing from other branches of original chancery jurisdiction. See *Beaver v. Erwin*, 7 Ired. (N. C.) Eq. 250. The statute providing that an injunction, upon a judgment at law, shall not issue more than four months after the rendition of judgment, does not apply where the ground of the application for an injunction did not exist when the judgment was rendered. *Kerns v. Chambers*, 3 Ired. (N. C.) Eq. 576.

Texas. — The statute (Hart. Dig. art. 1599) manifestly has no application to an injunction to stay execution sought for causes which have arisen subsequent to the rendition of the judgment. *Williams v. Bradbury*, 9 Tex. 487; *Clegg v. Varnell*, 18 Tex. 294.

Ohio Rev. St., authorizing courts to vacate their own judgments rendered at a previous term for fraud, — *held*, cumulative, and not to exclude an original action to impeach the judgment or to enjoin its collection. *Darst v. Phillips*, 41 Ohio St. 514.

Idaho. — As under the Code decrees are enforced by execution in the same way as judgment at law, an injunction may be granted, if otherwise proper, to restrain the execution of the decree. *Oro Fino, etc. Co. v. Cullen*, 1 Idaho T. 126.

Georgia. — Injunctions granted to restrain judicial sales, in the adjustment of equities incidental to the enforcement of peculiar stay-laws, relief acts, etc., enacted during and since the late war. *Seago v. Bass*, 49 Ga. 9. What facts and allegations will justify an injunction against an execution under the Georgia act of 1868 "for the relief of debtors, and to authorize the adjustment of debts on principles of equity," — considered. As to the constitutionality of the act, *quære*. *Dibble v. Pease*, 59 Ga. 618.

Tennessee. — Under the statutes of 1829 and 1831, a judgment against an

§ 82. **Conflicting Decisions.** — Any attempt to harmonize the authorities on all the minor divisions of this branch of our subject would be profitless and impracticable. It may be well, however, to observe that no controversy exists, or can exist, upon fundamental principles; and even where differences of opinion are found and differing results have been reached in the application of principles, a careful examination will usually disclose sufficient dissimilarity in the facts and situations of parties to account for them. The peculiar partitions of jurisdiction made by constitutions and statutes and the above mentioned practice acts in individual states (which cannot be here analyzed or further pursued), have also an important bearing and effect upon the decisions. The extent and nature of these must be ascertained by examining the cases cited herein and the statutes themselves.

§ 83. **General Principles governing herein.** — The broadest general principle which governs in administering relief against judgments at law, recognized in all cases, and expressed in many forms, is that where the judgment of a common-law court of general jurisdiction has been rendered by accident, or mistake, or through fraud, or any fact exists which proves it to be against conscience to execute the judgment, of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud, accident, or mistake, unmixed with any fault or negligence of himself or his agents, a court of equity may interfere by temporary or perpetual injunction to restrain the adverse party from availing himself of such a judgment.¹ The test

administrator or executor within six months after qualification, and an execution issued within less than twelve months, cannot be enjoined in chancery. *Roche v. Washington*, 7 Humph. (Tenn.) 142.

¹ *Wingate v. Haywood*, 40 N. H. 437. See also *Strup v. Sullivan*, 2 Ga. 275; *Benton v. Crowder*, 15 Miss. (7 Smed. & M.) 185; *Buckmaster v. Grundy*, 8 Ill. (3 Gilm.) 626; *Carrington v. Holabird*, 19 Conn. 84; *Hendrickson v. Hinchley*, 17 How. 443; *Wayne v. Wilson*, 1 Hempst. 698; *Foster v. State Bank*, 17 Ala. 672; *Watt v. Cobb*, 32 Ala. 530; *Hempstead v. Watkins*, 6 Ark. 317; *Menifee v. Ball*, 7 Ark. 520; *Pollock v. Gilbert*, 16 Ga. 398; *Venum v. Davis*, 35 Ill. 568; *Smith v. Allen*, 63 Ill. 474; *Skinner v. Deming*, 2 Ind. 558; *Minor v. Stone*, 1 La. An. 283; *Lee v. Hubbell*, 20 Ind. 551; *Glen v. Fowler*, 8 Gill & J. (Md.) 340; *Lyda v. Douple*, 17 Md. 188; *Smith v. Walker*, 16 Miss. (8 Smed. & M.) 131; *Cole v. Hunley*, Id. 473; *Love v. Bass*, 22 Miss. (12 Smed. & M.) 158; *Duncan v. Lyon*, 3 Johns. (N. Y.) 351; *Phelps v. Peabody*, 7 Cal. 50; *Robuck v. Harkins*, 38 Ga. 174; *Robbins v. Mount*, 3 Ga. 74;

offered by Justice Story as to whether an application for this relief should be granted is whether the case would be a proper one for a bill of review of a decree in a court of equity upon the discovery of new matter.¹ But since relief of this nature has the effect of granting to a party a new trial in equity of a matter which has already been tried and passed upon at law, jurisdiction to grant it is confined strictly to cases of fraud and unavoidable mistake and accident, which to refuse relief against would result in palpable hardship and injustice. It therefore follows that courts of equity will not relieve against a judgment at law where the case presented proceeds upon a ground which has been fully and fairly tried at law, although in the opinion of the court of equity the defence ought to have prevailed at law.²

§ 84. **Point at which Relief asked unimportant.** — But where a proper case for relief is clearly proven a court of equity will interpose without regard to the stage which the proceeding at law has reached. In its applicability, the remedy by injunction is not confined to any one point of the proceeding. As we have seen in the last preceding chapter, it is often granted to stay proceedings before judgment even after verdict; but after judgment it lies to stay execution;³ after execution, to restrain

Brandon v. Green, 7 Humph. (Tenn.) 130; *Bellamy v. Woodson*, 4 Ga. 175; *Taylor v. Sutton*, 15 Ga. 103; *Johnson v. Lyon*, 14 Iowa, 431; *Younge v. Billups*, 23 Miss. 407; *Prewitt v. Perry*, 6 Tex. 260; *Marine Insurance Co. v. Hodgson*, 7 Cranch, 332; *Fisher v. Green*, 5 Col. 541; *Brashear v. West*, 7 Pet. 603; *Moor v. Gamble*, 9 N. J. Eq. 246; *Huggins v. King*, 3 Barb. (N. Y.) 616; *Clute v. Potter*, 37 Id. 199; *Gatlin v. Kirkpatrick*, 1 Law Repos. (N. C.) 534; *Snyder v. Vanoy*, 1 Oreg. 344; *Jones v. Kilgore*, 2 Rich. (S. C.) Eq. 63; *Pearce v. Chastain*, 3 Ga. 226; *Meek v. Howard*, 18 Miss. (10 Smed. & M.) 502; *Brunley v. Rice*, 21 Tex. 171; *Gairity v. Russell*, 40 Conn. 450; *Jarvis v. Chandler*, 1 Turn. & Russ. 319; *Truly v. Wanzer*, 4 Howard, 142; *Emerson v. Udall*, 13 Vt. 477; *Ocean Ins. Co. v. Field*, 2 Story, 59; *Robinson v. Wheeler*, 51 N. H. 384; *Craft v. Thompson*, Id. 536; *Holland v. Trotter*, 22 Grat. (Va.) 136; *Lester v. Hopkins*, 26 Ark. 63. A court of equity will enjoin the enforcement of the alternative part of a judgment for the return of property or its value where the property was voluntarily returned before the judgment was rendered. *Thompson v. Laughlin*, 91 Cal. 313; 27 P. 752.

¹ Story's Eq. Jur. 888. See also Mitf. Eq. Pl., by Jeremy, 131; *Floyd v. Jayne*, 6 Johns. Ch. 479; *Woodworth v. Van Buskerk*, 1 Johns. Ch. 432.

² *Marine Ins. Co. v. Hodgson*, 7 Cranch, 336, 337. See *Walker v. Robbins*, 14 How. (U. S.) 584; *Hendrickson v. Hinckley*, 17 How. (U. S.) 445; *Briech v. McCauley*, 7 Gill, 189; *Simpson v. Lord Howden*, 3 Mylne & Craig, 97, 102, 103.

³ See *Grant v. Lathrop*, 3 Foster, 67; *Lewis v. Denkgrave*, 24 La. An. 489; *Whitehurst v. Green*, 69 N. C. 131; *Lesley v. Shock*, 3 Houst. 130; *infra*, § 162 *et seq.*

sale of property under it, or to stay the money in the hands of the sheriff,¹ or to stay the delivery of possession, if the writ following the judgment be a writ of possession.²

§ 85. **Courts of Equity reluctant to interfere.** — Such bills are viewed with like disfavor in England and in this country;³ and a court of equity will not enjoin the enforcement of a judgment except upon some distinct equitable ground, which neither was nor could be set up as a defence to the action at law.⁴ “It cannot act upon the case, but may upon the person, and so might well decree that, unless a party consents to have the judgment set aside and a new trial awarded, he shall be perpetually enjoined from executing it.”⁵

§ 86. **Principles apply to Foreign Judgments.** — These principles are as applicable to judgments rendered in foreign courts against which relief is sought by injunction *in personam* as in the case of

¹ *Kenyon v. Clarke*, 2 R. I. 67; *Kendall v. Dow*, 46 Ga. 607; *Marlin v. Jewell*, 37 Md. 560; *infra*, §§ 163–167.

² See 3 Wooddes. Lect. 56, pp. 406, 407, 412, 416; 1 Mad. Pr. Ch. 109, 110; Eden on Injunct. ch. 2, p. 44, etc.; *infra*, § 168.

³ *Carrington v. Holabird*, 17 Conn. 530; *Marsh v. Edgerton*, 1 Chand. (Wis.) 198. An injunction to restrain the execution of a decree in equity cannot be granted. *Greenlee v. McDowell*, 4 Ired. (N. C.) Eq. 481.

⁴ *Bachelor v. Bean*, 76 Me. 370; *Harrison v. Nettleship*, 2 Mylne & Keen, 423; *Murray v. Graham*, 6 Paige, 622; *Lockard v. Lockard*, 16 Ala. 423; *Foster v. The State Bank*, 17 Ala. 672; *Franklin Mill Co. v. Schmidt*, 50 Ill. 208. Relief will only be granted where the defence could not at the time or under the circumstances be made available at law without any laches of the party. *Farquharson v. Pitcher*, 2 Russell, 81; *Murray v. Graham*, 6 Paige, 622. A complainant in chancery must go upon grounds of which he could not have availed himself at law, or which he was prevented from availing himself of by the fraud of the opposite party, or by accident, if he undertakes to impeach a judgment at law. *Rice v. Railroad Bank*, 7 Humph. (Tenn.) 39. The same certainty of proof is not required to establish the existence of that defence. *Id.* The presumption is that the court that renders a judgment is competent to enforce it, and it is only in special cases that chancery interferes. *Macon, etc. R. R. Co. v. Parker*, 9 Ga. 377. A court of equity will not grant a bill for a new trial unless it is a very clear case of fraud or injustice, or upon newly discovered evidence, which could not possibly have been produced at the first trial. *Carter v. Bennett*, 6 Fla. 214.

⁵ *Blaham v. Moreland*, 11 Ark. 443. What fact will justify the interference of a court of equity with judgments and executions of courts of law, — determined, in cases depending upon peculiar and unusual circumstances. *Good v. Hart*, 16 Miss. (8 Smed. & M.) 787; *Farmers' Bank v. Douglas*, 19 Miss. (11 Smed. & M.) 469; *Grayson v. Wilson*, 27 Miss. 553; *Scott v. Witlow*, 20 Ill. 310; *Ewing v. Nickle*, 45 Md. 413. Compare *County Commissioners of Garrett County v. Franklin Coal Co.*, *Id.* 470; *Gaines v. Kennedy*, 53 Miss. 103.

judgments of domestic tribunals. It is not the practice of courts of equity to assume jurisdiction in favor of parties who, having had an opportunity of asserting their title in another court, even though it be a foreign court, where the matter has already been the subject of adjudication, have either missed that opportunity or have not thought proper to bring that title forward.¹ A foreign judgment is now generally considered as conclusive as a domestic judgment where it has been rendered upon the merits. Yet, where it has been effected by fraud, and is sought to be made available within the jurisdiction of a domestic court, the latter will restrain its enforcement in the same way, and with like effect as in the case of unconscionable domestic judgments.² Thus, where a vendee of land takes a bond for a deed, and gives his note for the purchase-money, with a power of attorney to confess judgment thereon, and the vendor fails to comply with the terms of the bond, and subsequently obtains judgment by confession upon the note in another state, without notice to the vendee, equity will restrain the enforcement of the judgment.³

§ 87. **Diligence required in applying for Relief.** — After the court in which the action was tried has once exercised discretion as to relieving a party from a judgment, he must show good reason for the delay, if he suffers the time to expire before again moving in the matter by an application for an injunction.⁴ When application in equity for relief against a judgment at law is delayed, it furnishes a presumption against the equity of the proposed defence.⁵ Courts of equity in these, as in other cases, and similarly

¹ *Marquis of Breadalbane v. Marquis of Chandos*, 2 Mylne & Craig, 721, 732, 733; *Norton v. Woods*, 5 Paige, 249. See also *McJilton v. Love*, 13 Ill. 486, where it was held that, in Illinois, a bill may be filed to enjoin the proceedings upon a judgment of one of the courts of the state, recovered upon a judgment in the courts of another state, if the party applying has not been guilty of any laches in the assertion of his rights, and the judgment of the foreign court has been reversed. An injunction will not issue to restrain an execution sale of real estate in a foreign state, and from prosecuting legal proceedings therein against its owner for the collection of a debt alleged to be due defendants, where it appears that judgment in the action has been rendered and sale made thereunder to parties not before the court. *Mexican Ore Co. v. Mexican Guadalupe Min. Co.*, (Cir. Ct.) 47 F. 351.

² *Bowles v. Orr*, 1 Younge & Coll. 464, 473.

³ *Cooper v. Tyler*, 46 Ill. 462.

⁴ *Myrick v. Edmundson*, 2 Minn. 259; *Ratliff v. Stretch*, (Ind. Sup.) 30 N. E. 30.

⁵ *Bartlett v. Glandy*, 3 Mo. 345.

to courts of law, require due and reasonable diligence from all parties in suits, and give effect to the sound policy of suppressing multiplicity of suits.¹ But the question of laches in making the application for relief depending largely upon circumstances and the situation of the parties, and its decision being to a great extent discretionary, much divergence, though but little real conflict, will be found in the authorities. In one case, though only six months had elapsed after the judgment was rendered, and before an injunction was granted, yet because the facts stated as the grounds for praying for an injunction appeared to have existed and been known to the party, when the judgment was rendered, it was held that the injunction ought to be dissolved.² In another, a decree for sale of land had remained unexecuted for fourteen years, and an injunction was asked for on the ground that the debt, for which the sale was ordered, had been paid. It was held that, while a perpetual injunction should not issue until the facts had been investigated, yet it was entirely proper to grant a temporary injunction, pending the investigation.³ And even where a judgment is obtained without notice, a party may by standing by with knowledge of the facts, and in the enjoyment of rights under it, by his laches and acquiescence debar himself from all claim to equitable relief. Where a judgment obtained by default, and without notice, was upwards of twenty years old, the court refused to disturb it, it appearing that an execution title to real estate had vested under it, upon a writ attaching the defendant's real estate when he was open and at large within the state, and obtained knowledge of the judgment about seventeen years before the filing of his bill for relief, the sole excuse for the delay to proceed being that the complainant had no evidence of the facts upon which he relied for relief until the passage of a statute enabling parties to be witnesses for themselves in civil cases, the purchaser

¹ *Bateman v. Willoe*, 1 Sch. & Lefr. 204; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 336, 337. See also *Barker v. Elkins*, 1 Johns. Ch. 465.

² *Doss v. Miller*, 6 Tex. 338.

³ *Buster v. Holland*, 27 W. Va. 510. Plaintiffs' agent bought land for them in 1878, taking a bond for a deed running to himself, which in 1881 he assigned to plaintiffs, who in the mean time were in possession and made improvements on the land, on which defendants caused execution to be issued in 1882 on a judgment recovered in 1879 against said agent and another, whereupon plaintiffs brought injunction. *Held*, that plaintiffs were not guilty of any laches. *Dierks v. Martin*, 16 Neb. 120.

under the execution having in the meantime built upon and improved the estate.¹

§ 88. **Same — Applying for New Trial.** — The same rule as to diligence applies with respect to applying to the court rendering the judgment for a new trial, if the case be such that a new trial may be granted upon proper application. If, such being the case, the facts constituting the ground for relief have come to complainant's knowledge in time for him to have moved for a new trial, and he has neglected to do so, his laches therein will warrant a court of equity in refusing an injunction, however meritorious the claim.² Thus, where it was left to the choice of a party's counsel in a court of law to take judgment for nominal damages or have the case sent back for a new trial, and from a misapprehension of the facts the judgment was taken, and would be liable to do the party injustice, and the time to petition for a new trial had elapsed, it was held that a bill in chancery for a new trial would not be sustained.³ So where defendants consent to waive all defences, and confess judgment on the strength of a verbal agreement that plaintiffs will stay execution for a year, they cannot enjoin a sale under the execution which plaintiffs levied before the end of the year, being guilty of laches in standing by and permitting the execution to be levied without moving the court to recall it.⁴

§ 89. **Same — Making Defence at Law.** — While a case must always be made out which appeals to the conscience of the chancellor, yet it does not follow that a court of equity will grant relief against a judgment at law, merely because it is inequitable.⁵ Equity will

¹ *Briggs v. Smith*, 5 R. I. 213. The right to enjoin, by bill in equity, a judgment at law, founded on a note given for a gaming consideration, is not limited, by analogy between such a bill and a bill of review, to three years from the date of the judgment. *Paulding v. Watson*, 21 Ala. 279.

² See *Menifee v. Meyers*, 38 Tex. 691, *Burton v. Wiley*, 26 Vt. 430. See also *Bateman v. Willoe*, 1 Sch. & Lefr. 201; *Lansing v. Eddy*, 1 Johns. Ch. 49; *Smith v. Lowry*, 1 Johns. Ch. 820; *Barker v. Elkins*, 1 Johns. Ch. 465; *Simpson v. Hart*, 1 Johns. Ch. 97, 98; *Dodge v. Strong*, 2 Johns. Ch. 228; *Duncan v. Lyon*, 3 Johns. Ch. 351; *Burton v. Wiley*, 26 Vt. 430; *Falls v. Robinson*, 5 Maryland, 365; *Foster v. Wood*, 6 Johns. Ch. 90; *Norton v. Woods*, 5 Paige, 249. But it was held that if the party had no opportunity to move for a new trial in the court where the verdict was rendered, equity will grant a new trial. *Knifong v. Hendricks*, 2 Grat. 212.

³ *Burton v. Wiley*, 26 Vt. 430.

⁴ *Affirming s. c.* 85 Cal. 385; *Moulton v. Knapp*, 88 Cal. 446; 26 P. 210.

⁵ *Stinnett v. Branch Bank at Mobile*, 9 Ala. 120; *Cairo, etc. R. R. Co. v. Titus*, 27 N. J. Eq. 102.

not maintain jurisdiction of a suit for relief against a judgment, merely on the ground that the demand may be unconscientious, and that injustice may have been done, provided it was competent for the party to have pleaded the matter before the court, in the original action, either upon issues joined or upon motion to set aside the verdict or judgment; nor can the assistance of equity be invoked so long as the remedy by motion exists.¹ Complainant must show (1) that his failure to make a defence was not attributable to his own omission, neglect, or default; and (2) that he has a good defence to the entire cause of action, or as to such part of it as he proposes by his bill to litigate.² The rule has been frequently and variously expressed. The general principle is well settled by many decisions, based upon cases presenting peculiar phases and circumstances, that after a verdict in an action at law, whether judgment has been entered thereon or not, a party who is chargeable with laches in making his defence, or might by reasonable diligence have procured the requisite proofs before the trial, will be refused an injunction against further proceedings in the law court.³ But it is no laches in a defend-

¹ *Ede v. Hazen*, 61 Cal. 360.

² *Hair v. Lowe*, 19 Ala. 224; *Richmond Enquirer v. Robinson*, 24 Grat. (Va.) 548.

³ *Protheroe v. Forman*, 2 Swanst. 227, 232, 233; *Curtess v. Smallridge*, 1 Ch. Cas. 43; 2 Freem. 178; *Tovey v. Young*, Prec. in Chan. 193; *Smith v. Lowry*, 1 Johns. Ch. 320; *Dodge v. Strong*, 2 Johns. Ch. 280; *Smith v. Walker*, 8 S. & M. 131; *Trevor v. McKay*, 15 Ga. 550; *Powell v. Stewart*, 17 Ala. 719; *Ricker v. Pratt*, 48 Ind. 73; *Jordan v. Corley*, 42 Tex. 284; *McBride v. Little*, 115 Mass. 308; *Taylor v. Fore*, 42 Tex. 256; *Long v. Smith*, 39 Tex. 160; *Dibble v. Truluck*, 12 Fla. 185; *Rogers v. Kingsbury*, 22 Ga. 60; *Vaughn v. Tuller*, 23 Ga. 366; *Cackley v. Beall*, 37 Ga. 588; *Ramsey v. Perley*, 34 Ill. 504; *Titcomb v. Potter*, 12 Me. (2 Fairf.) 208; *Williams v. Jones*, 18 Miss. (10 Smed. & M.) 108; *Brandon v. Green*, 7 Humph. (Tenn.) 130; *Faulkner v. Campbell*, 1 Morr. (Iowa) 148; *Miller v. McGuire*, Id. 150; *Pavner v. Evans*, 7 B. Mon. (Ky.) 420; *Scroggins v. Howorth*, 23 Miss. 514; *Jordin v. Thomas*, 34 Miss. 72; *Todd v. Fisk*, 14 La. An. 13; *Gibson v. Moore*, 22 Tex. 611; *Krichbaum v. Bridges*, 1 Iowa, 14; *Vaughn v. Johnson*, 9 N. J. Eq. (1 Stock.) 173; *Wynn v. Wilson*, Hempst. 698; *Kidwell v. Masterson*, 8 Cranch C. Ct. 52; *Schroepell v. Shaw*, 3 N. Y. (3 Comst.) 446; *Champion v. Miller*, 2 Jones (N. C.) Eq. 194; *Wells v. Wall*, 2 Oreg. 295; *Fitzhugh v. Orton*, 12 Tex. 4; *Crawford v. Wingfield*, 25 Tex. 414; *Creath v. Sims*, 5 How. 192; *Sample v. Barnes*, 14 How. 70; *Hungerford v. Sigerson*, 20 How. 156; *New Orleans v. Morris*, 3 Woods C. Ct. 103; *Noble v. Butler*, 25 Kan. 645; *Garrison v. Cobb*, 106 Ind. 245; 6 N. E. 332; *Michel v. Sammis*, 15 Fla. 308; *Greene v. Johnson*, 21 La. An. 464; *Young v. Morgan*, 13 Neb. 48; *O'Connor v. Sheriff*, 30 La. An. Part 1, 441; *Compton v. Blair*, 46 Mich. 1; *Miller v. Clements*,

ant that he does not attempt a defence which would be wholly unavailing.¹

§ 90. **Same — Procuring Evidence.** — An injunction will not be granted on the mere ground of defendant's ignorance of facts existing at the time the judgment was rendered. He must show that his ignorance was not due to any lack of diligence on his part, or that it was occasioned by the acts of the other party.² It is no ground for an injunction against the collection of a judgment at common law that plaintiff possessed certain account books which defendant was unable to obtain in time to examine before trial, which show, upon subsequent examination, that

54 Tex. 351; *Casey v. Gregory*, 13 B. Mon. (Ky.) 505; *Oregon Ry. & Nav. Co. v. Gates*, 10 Or. 514; *Taliaferro v. Branch Bank of Montgomery*, 23 Ala. 755; *Agard v. Valencia*, 39 Cal. 292, 303; *Lebanon Mut. Ins. Co.'s Appeal*, (Pa.) 1 A. 559; *Smith v. Phinzy*, 71 Ga. 641; *Hinrichsen v. Van Winkle*, 27 Ill. 334; *s. p. Pearce v. Chastain*, 3 Ga. 226; *Tompkins v. Tompkins*, 11 N. J. Eq. (3 Stock.) 512. Where defendant fails to appear to an attachment, and judgment is entered by default, an injunction will not lie to prevent execution. *Ahern v. Fink*, 64 Md. 161; 3 A. 32.

INDORSER. — There is no equity on the face of a bill seeking to enjoin the collection of a judgment against the complainant as indorser of a note, on the ground that the indorsement was obtained by false representations, and assigning no reason for not making this defence in the suit at law. *Crump-ton v. Baldwin*, 42 Ill. 165.

TRUSTEE. — Chancery will not relieve against a judgment rendered against one as trustee, on the ground that such trustee, through forgetfulness, failed to attend the court rendering such judgment, and make his disclosure, even though it appear that such trustee would have been discharged upon making such disclosure, when no fraud is imputable to the party obtaining such judgment. *Warner v. Conant*, 24 Vt. 351.

MARRIED WOMAN — SURETY FOR HUSBAND. — A married woman was sued on a promissory note which she had signed with her husband, and though personal service was made on her she did not appear, but suffered judgment by default, on which execution was levied. *Held*, that as she neglected to make her defence at law, and allowed the judgment to stand, she could not maintain a bill in equity to set aside the execution on the ground that she had signed as surety for her husband, and the judgment was void as against her. *Wilson v. Coleridge*, 42 Mich. 112.

ILLEGAL CONSIDERATION — STAY-BOND. — A court of equity will not grant an injunction to restrain the execution of a judgment recovered at law upon a contract, the consideration of which was illegal, when the party praying for the injunction knew of the illegality of the contract, and might have set it up in defence of the action at law, and after the recovery of the judgment against him executed a bond for the payment of the judgment, which operated as a stay of judgment against him. *Sample v. Barnes*, 14 How. 70.

¹ *Roxbery v. Houston*, 39 Me. 812.

² *Corulos v. Koch*, 72 Mo. 645; *Kirby v. Pascault*, 53 Md. 531; *Hevener v. McClung*, 22 W. Va. 81.

plaintiff, who is insolvent, is indebted to defendant in an amount greater than that of the judgment recovered.¹

In cases where the knowledge of the opposite party, material to the complainant, is discovered by him after trial and judgment, he may be relieved in equity as in other cases of newly discovered evidence.² But where bills of discovery are still in use, a defendant who has neglected to file a bill for a discovery of facts known to him, and material to his defence, and has suffered the cause to go to trial without adequate proof of such facts, cannot afterwards claim an injunction or a new trial in a court of equity, for it was his own fault that he did not prepare himself with such proof, or file a bill for a discovery and procure a stay of the trial until the discovery.³

§ 91. **Same — Employment and Attendance of Counsel.** — Execution of judgment will not be enjoined on the ground of the absence of counsel from the trial, it not appearing that other counsel might not have been obtained.⁴ This rule was applied where a garnishee who had discharged the judgment, being sued on the original debt, for the use of another, employed as counsel to defend the suit the same attorneys who had obtained the judgment against him as garnishee. He did not inform them of his defence, in consequence of which a second judgment was rendered against him for the same debt, and it was held that this was gross negligence, and that chancery could not relieve him.⁵ So a guardian was held not entitled to equitable relief from a probate decree on the general averment of "sickness, bad roads, bad weather, personal attention to other business, and a message sent to the probate judge through the deputy sheriff that he could not be present on the day appointed for the settlement," where it did

¹ *Hines v. Beers*, 76 Ga. 9.

² *Jordan v. Loftin*, 12 Ala. 547.

³ *Sewell v. Freeston*, 1 Ch. Cas. 65; *Mitf. Eq. Pl.*, by Jeremy, 132; *Protheroe v. Forman*, 2 Swanst. 227, 232, 233. See also *Hankey v. Vernon*, 2 Cox, 12; *Williams v. Lee*, 3 Atk. 224; *Baronne v. Brent*, 1 Vern. 176; *Richards v. Symmes*, 2 Atk. 319; *Taylor v. Shepherd*, 1 Younge & Coll. 271, 280; *Whitmore v. Thornton*, 3 Price, 281; *Field v. Beaumont*, 1 Swanst. 209; *Barker v. Elkins*, 1 Johns. Ch. 465; *McVickar v. Wolcott*, 4 Johns. 510; *Le Guen v. Gouverneur*, 1 Johns. Cas. 436.

⁴ *Crim v. Handley*, 94 U. S. 652. It was held that equity will not enjoin execution of an unjust judgment rendered through the complainant's neglect to have an attorney represent him, even though himself kept away from court by threats of violence. *Prater v. Robinson*, 11 Heisk. (Tenn.) 391.

⁵ *Sanders v. Fisher*, 11 Ala. 812.

not appear that he tried to procure counsel or obtain a continuance.¹ And a surety on a claim bond in which a corporation was principal, relying upon the counsel for the corporation to represent him, but making no effort to ascertain whether such counsel had authority from the corporation to represent him, was held not entitled to relief from the judgment rendered against him.²

§ 92. **Same — Cross-examination of Witnesses ; Illness of Witnesses.** — The same rule applies, and the relief will be refused, where the facts on which the bill is founded, although discovered since the trial, might have been established at the trial upon the cross-examination of a witness, and the party was put upon the inquiry.³ Nor will an injunction be granted on the ground that a witness was too ill to testify understandingly, no postponement of the trial having been asked.⁴

§ 93. **Same — Entering Appearance ; Filing Answer ; Procuring Record.** — A judgment by default against a defendant who made no appearance or defence will not be enjoined on the ground that the defendant was precluded by intense excitement prevailing in the country from attending court, and that the judge of the court said that he would hold no session for the trial of causes.⁵

Failure to plead to an action in time to prevent judgment by default, no sufficient excuse for the failure being shown, constitutes no ground for relief against the judgment. Accordingly it was held that a contingent liability to which the estate is exposed, known to the administrator before a judgment was rendered against him at the instance of distributees, and not pleaded to the action, would not serve as the basis of an injunction to restrain the collection of the judgment, the liability being no less contingent at the date of the application than it was at the rendition of the judgment.⁶ Nor will injunction be granted on the ground that a necessary record could not be found by the clerk, no continuance having been asked, and no attempt to substitute secondary evidence for the record having been made.⁷

¹ *Waldron v. Waldron*, 76 Ala. 285.

² *Klegg v. Darragh*, 63 Tex. 357.

³ *Taylor v. Shepherd*, 1 Younge & Coll. 271, 280 ; *Cairo, etc. R. R. Co. v. Titus*, 27 N. J. Eq. 102.

⁴ *Crim v. Handley*, 94 U. S. 652.

⁵ *George v. Tutt*, 36 Mo. 141.

⁶ *Brown v. Wilson*, 56 Ga. 534.

⁷ *Crim v. Handley*, 94 U. S. 652.

§ 94. **Same — Claiming Set-offs and Credits and Counter-claims.** — Nor will equity enjoin a judgment at law on the ground of a set-off which the complainant might have claimed, but voluntarily waived.¹ Nor will equity relieve against a judgment at law because the party did not prove on the trial payments which he alleges he made, unless he shows some fraud or circumvention practised to prevent his making the proof.² A party will not be allowed to arrest an execution by a defence of compensation which he might have made, but omitted to make, in the suit wherein the judgment was rendered, the execution of which he seeks to arrest.³ The same rule applies where a party defendant might have pleaded by way of counter-claim damages arising from the commission of a tort, especially if by his own laches his action for the tort has become barred by the statute of limitations.⁴ So, in the absence of proper diligence to discover the facts, a party cannot have the benefit in equity of a partial payment made by way of compromise before judgment, upon the ground that he did not acquire a knowledge of it in time to plead it;⁵ nor of relief from a judgment on the ground that a payment was not indorsed on the bond on which the judgment was rendered.⁶ A claim which could have been set off in the probate court before the decree there, but which, by advice of counsel, was not there presented, is no ground for relief in equity against that decree.⁷ Under the codes (whatever may have been the case under the former practice), mistake in computation made by arbitrators may be set up by the defendant in an action on the award, and he cannot, therefore, maintain a separate action to restrain the prosecution of such action against him on the award on the ground of such mistakes.⁸

¹ *Hendrickson v. Hinckley*, 17 How. 443. See *Bradley Salt Co. v. Keating*, (Sup.) 16 N. Y. S. 795.

² *Deaver v. Erwin*, 7 Ired. (N. C.) Eq. 250; *Grindol v. Ruby*, 14 Ill. App. 439; *Rider v. Morsell*, 3 McArthur (D. C.), 186.

³ *Donnell v. Parrott*, 13 La. An. 251.

⁴ *Hays v. Urquart*, 63 Ga. 323. See also *Ponder v. Cox*, 26 Ga. 485.

⁵ *Stinnet v. Branch Bank at Mobile*, 9 Ala. 120.

⁶ *Harnsbarger v. Kinney*, 13 Grat. (Va.) 511. Where A. brought a bill to restrain execution on a judgment rendered against him for failure to answer, on the ground that he had neither filed an answer, nor honestly supposed he had, and plaintiff had fraudulently taken judgment for more than he knew was due, — *held*, that the bill showed no equity. *Ross v. Holloway*, 60 Miss. 553.

⁷ *Duckworth v. Duckworth*, 35 Ala. 70.

⁸ *Ferson v. Drew*, 19 Wis. 225.

§ 95. **Same — Advice and Assurances of Others.** — A party is required to be alert and diligent in attending the place of trial, in discovering his defence, and in bringing it forward. He must exercise, either himself or by counsel, an intelligent judgment in all matters relating to the cause; and it is no ground for relief in equity that he has relied upon, and been misled by misrepresentations and assurances of persons not parties. Thus, an injunction was refused a complainant where his omission to defend was caused by his being misled by the clerk as to the character of the suit.¹ So where a widow of a deceased partner in a firm was sued as a member of the firm on an indebtedness of the firm, and she made no defence, and judgment was rendered against her with the other defendants, it was held that she was not entitled to relief against the judgment by injunction, on the ground that she relied upon the advice of a friend that she was not liable, and that judgment could not be recovered against her, and accordingly made no defence, although she was not in fact a partner, and was not liable for the debt.² The rule has no application where the misleading representations and assurances were made by the opposite party. Accordingly where, in consequence of representations made to him by the holder of a note, the surety upon it ceased to maintain a valid ground of defence, proceedings under a judgment so obtained was enjoined.³

§ 96. **Mere Negligence of Attorney or Agent no Ground for Relief.** — That a judgment at law was recovered against a party who duly appeared and answered, through the mere negligence (not fraudulent connivance) of his attorney, in not attending the trial, is no ground for an injunction to restrain proceedings upon it, even if the attorney is not responsible.⁴ Nor can a party against whom a judgment at law is rendered by default, obtain

¹ *Hanna v. Morrow*, 43 Ark. 107.

² *Hayden v. Moore*, 4 Bush (Ky.), 107.

³ *Dew v. Hamilton*, 23 Ga. 414. As to what are proper allegations in a bill based upon such ground, see *French v. Garner*, 7 Port. (Ala.) 549.

⁴ *Rogers v. Parker*, 1 Hugh. 148. See *Kern v. Strausberger*, 71 Ill. 413. A. and B. having a suit in court, agreed that the suit should be dismissed, and B. the defendant gave a promise in writing to pay a certain part of the sum in controversy. The suit was not dismissed, but, several years afterwards, the defendant continuing to be represented in court by his attorney, judgment was entered for the amount claimed, and execution issued for near the amount agreed to be paid. The defendant applied for an injunction, which the court denied. *Watrous v. Rodgers*, 16 Tex. 410.

relief against it in equity, upon the ground that the attorney whom he retained to appear and defend the suit for him, failed to do so, and appeared for the opposite party, when the proof shows that he had only requested the attorney to attend to any and all business for him, and had not mentioned any particular case.¹ On an application by a judgment debtor, for an injunction, on the ground of a set-off which the complainant alleged that he was prevented from pleading by the sickness of his family, and the absence of the counsel to whom he had communicated his case, it appeared that the set-off was neither filed nor pleaded, and that, though one of the complainant's counsel was present at the trial, no motion for a continuance was made, and no affidavit of the grounds for a continuance was filed. It was held, that there was no cause for an injunction and a new trial.² Nor will an injunction be granted to stay execution of a judgment rendered because of the neglect of the defendant's attorneys to present a bill of exceptions within the time agreed upon.³ So where a judgment was rendered against a married woman by consent of her attorney and her husband, who was present and held a power of attorney from her to transact her business, and she, though sick, was present in the town where the court was in session, it was held, that a court of equity would not, in the absence of fraud, enjoin it, and grant a new trial, even though entire justice may not have been done her.⁴ The only remedy of the judgment debtor in such cases, if damaged, is by action against the derelict attorney⁵ or agent.⁶

§ 97. **Otherwise where Fraudulent Connivance and Insolvency of Attorney are shown.** — Where the conduct alleged consists

¹ *Watts v. Gayle*, 20 Ala. 817.

² *Griffith v. Thompson*, 4 Grat. (Va.) 147. Where the case, being for trial before a justice of the peace, was continued on account of defendant's absence, and more than two months afterwards, a day being set for trial, defendant's attorney notified the justice, that he had no defence, and that he would have nothing more to do with the case, and thereupon judgment was rendered by default, although the defendant, who had gone away several times between the time of the continuance and the day fixed for the trial, had no knowledge of the time appointed therefor, it was held that the complainant was not entitled to an injunction against the judgment. *Derinney v. Mann*, 24 Kansas, 682.

³ *Ruppertsberger v. Clark*, 58 Md. 402.

⁴ *Newman v. Morris*, 52 Miss. 402.

⁵ *Barhorst v. Armstrong*, 52 F. 2; *Everett v. Warner Bank*, 58 N. H. 340.

⁶ *Newman v. Morris*, 52 Miss. 402.

not in mere negligence of counsel, but in an active breach of duty, such as connivance with the plaintiff in the judgment, it seems that if the facts are well pleaded, and a good defence is made to appear, complainant will be entitled to an injunction against the judgment so obtained.¹ And where by the neglect of an attorney of good reputation, a party has been defaulted, if he, immediately upon discovering the default, applies for redress, he is not guilty of laches, and, especially if the attorney is insolvent, he will be relieved from the default.² So where an attorney brought a suit without any authority from the plaintiffs and the defendant obtained a judgment for costs, a court of equity restrained the enforcing of such judgment by a perpetual injunction, it being shown that the attorney was poor and unable to respond.³

§ 98. **Mistake or Ignorance of Counsel no Ground for Relief.** — A party cannot obtain a new trial in equity, on the ground that his counsel mistook the facts of his defence, if he was present at the trial at law;⁴ nor on account of the death of the original counsel employed in the defence of a cause, and the want of familiarity, on the part of the counsel who succeeds him, with the grounds of defence.⁵ Where defendant was ably represented by counsel on the trial of a case, which was fairly conducted, the fact that, by mistake, another of his attorneys, who had cumulative evidence in his possession, was not present at the trial, nor until the case had been submitted to the jury, and that the court thereafter refused to permit him to introduce such evidence, and denied his motion for a new trial, this will not warrant the issuance of an injunction restraining the collection of the judgment.⁶

§ 99. **Equitable Ground for Relief must be shown.** — It is a general principle that a judgment will not be enjoined, unless clearly contrary to equity and good conscience.⁷ If the judgment

¹ *Hartford Fire Ins. Co. v. Meyer*, 30 Neb. 135; 46 N. W. 292; *Thompson v. Laughlin*, 91 Cal. 317; 27 P. 752.

² *Huebschman v. Baker*, 7 Wis. 542.

³ *Smyth v. Balch*, 40 N. H. 363.

⁴ *Jamison v. May*, 13 Ark. 600.

⁵ *Powell v. Stewart*, 17 Ala. 719.

⁶ *Appeal of Waldo*, 135 Pa. St. 181; 19 A. 1078.

⁷ *Wright v. Eaton*, 7 Wis. 595. See also *Bradford v. Downs*, 48 N. Y. S. 1051; 24 App. Div. 97; *Perry v. Thompson*, (Ala.) 18 So. 524.

rendered is not inequitable as between the parties, no matter how irregular it may be, and even though it be void, a court of equity will not interfere, but will leave the defendant to such remedies, if any, as a court of law can afford him to avoid its effect.¹ Where it appeared from the pleadings and proof, that a mortgage executed by a debtor to his creditor was really for an unascertained balance of accounts, which the sum named in the mortgage was supposed to be sufficient to cover, but which was not in fact sufficient, and the creditor had obtained a judgment

¹ *Stokes v. Knarr*, 11 Wis. 389; *Hiles v. Mosher*, 44 Wis. 601. Not ground for relief that a judgment by default was entered without the inquiry as to damages required by law. *Boyd v. Cheseapeake, etc. Co.*, 17 Md. 195. Nor is payment to an officer who never had the execution in his hands. *Turner v. Belew*, 3 J. J. Marsh. (Ky.) 50. Nor is champerty in the prosecution of a suit at law. *Hunt v. Lyle*, 8 Yerg. (Tenn.) 142. Nor discovery of cumulative evidence. *Pemberton v. Kirk*, 4 Ired. (N. C.) Eq. 178; *Powell v. Watson*, 6 Id. 94. Nor the refusal of the judge to continue a cause upon motion, supported by affidavit. *Western v. Woods*, 1 Tex. 1. The plaintiff bought the intestate's lands at a sale by order of the court, and the purchase-money was distributed among sixteen heirs. The defence, having a judgment against the intestate, obtained in his lifetime, and which the assets in the administrator's hands were insufficient to satisfy, was about to levy execution on the land. *Held*, that plaintiff had no equity to restrain defendant from so levying. *Moore v. Wright*, 14 Rich. (S. C.) Eq. 132.

WHEN SURETY NOT RELEASED IN EQUITY. — A letter from a surety in a replevin bond giving his assent to the stay of execution until a fixed time, and longer if the principal asked it, is substantially a power of attorney to the principal, and subsequent postponements at request of the principal do not release the surety from his liability so that he can enjoin an execution issued more than one year after a former execution on the bond. *Furber v. Bassett*, 2 Duv. (Ky.) 433.

RELIEF AGAINST SURETY REFUSED. — An administrator *de bonis non* recovered a decree, on final settlement, against the administrator in chief: the money was collected of the surety of the latter; the decree was afterwards reversed, and the surety sued at law to recover the money which he had paid. The defendant, alleging that he had paid over the money to the distributees of the estate, some of whom were insolvent, and that the surety had been indemnified by his principal, prayed for an injunction against the plaintiff and the suit at law, and for general relief. *Held*, that the defendant was not entitled to an injunction. *Simmons v. Williams*, 27 Ala. 507.

NOTE MADE TO DEFRAUD CREDITORS. — Where a temporary injunction was sought to restrain execution on a judgment, which had been rendered on a promissory note on default, the complainant alleging that the plaintiff and the defendants were relatives, and that the note had been due for a long time, and that this was done to defraud the other creditors, and it appeared that no defence was made because no valid defence existed, and that the note was for a valid and valuable consideration, the injunction was refused. *Sohier v. Merrill*, 3 Woodb. & M. 179.

against the debtor for the residue, it was held, that the payment of the sum named in the mortgage was no reason for an injunction to stay proceedings upon the judgment.¹ Pending a suit against a husband, he conveyed land through a third person to his wife, without any valuable consideration. After judgment against him, execution thereon was levied on his interest in the land. It was held that the wife was not entitled to an injunction to restrain the sale on execution.²

The averment in a petition, which seeks to enjoin the execution on mere technical grounds, and without disclosing merits, must be taken most strongly against the party making them. So, where one of two defendants, the other being dead, sought to enjoin, on technical grounds, an order of sale, and did not allege that the property or any part of it belonged to the petitioner, the court held that the injunction was properly dissolved.³ And a court of equity will not entertain a bill where the plaintiff in possession seeks to enforce a merely legal title to land without any supervening equity.⁴

§ 100. **Same — Fraudulent Assignment of Judgment; Payment with Notice of Assignment, etc.** — A purchaser of a judgment who had not actually paid the purchase-money at the time of the commencement of a suit in equity to set aside a sale under such judgment, is not entitled to protection, as a *bona fide* purchaser, as against the complainant's equity.⁵ On the same principle, where the defendant in a judgment pays the amount to the plaintiff, after due notice of an assignment of the judgment, equity will not relieve him from an execution thereon for the benefit of the assignee.⁶

¹ Gear v. Parish, 5 How. 168.

² Good v. Merkowitz, 85 Mo. App. 658.

³ Gothard v. Reilly, 14 Tex. 461.

⁴ Freeman v. Timanus, 12 Fla. 393. It is no ground for continuing an injunction upon a judgment at law, that there is a mistake in a title-bond of the description of the land, without showing that the other party, on request, refused to correct the mistake. Long v. Brown, 4 Ala. 622.

⁵ Christie v. Bishop, 1 Barb. (N. Y.) Ch. 105.

⁶ Holland v. Dale, Minor (Ala.), 265. At the trial of the replevin, brought by A., of property in the hands of an officer under an execution against B., judgment was rendered for the officer for the full value of the property, which exceeded the amount of the original execution. Held, that the assignment by B. of his interest of the surplus of the property, after satisfaction of the execution against him, to A., gave A. no equitable right to enjoin the officer from collecting the whole of the judgment against him. Hohenthal v. Watson. 34 Mo. 188.

§ 101. **Same — Illegal Contract ; Parties in pari delicto.** — Equity will not enjoin a judgment on the ground that the contract on which the action was brought was prohibited by statute. The parties being *in pari delicto*, neither can be relieved.¹ For similar reasons a person holding a piece of property under a fraudulent title cannot maintain an injunction against the sale of the property by judgment creditors of his vendors.² Nor will relief in equity be granted against a judgment obtained at law upon a promissory note given solely for the purpose of testing, by a collusive action, whether the maker had any title in property held in trust for his wife.³

§ 102. **Complainant must offer to do Equity.** — The maxim that “he who seeks equity must do equity” applies where the relief sought is preventive as in other cases. Accordingly, where a party purchases land subject to judgment liens, and contracts to pay off the judgments, he will not be aided by equity to prevent the collection of such judgments out of the land if he fail to pay them off in conformity with his contract.⁴ A bill for an injunction to restrain execution of a judgment did not allege fraud on the part of the plaintiff in the judgment, but merely that the deputy sheriff served the summons on the defendant out of his bailiwick, and being informed of the defendant’s residence out of his bailiwick, failed to make the return of “*non est*,” as he had promised to do. The bill also admitted the defendant’s indebtedness for a part of the amount for which the judgment was recovered, but did not state how much, nor offer to pay it. It was held that these allegations were not sufficient to authorize the granting of an injunction.⁵ And where a

¹ Creath v. Sims, 5 How. 192 ; Sample v. Barnes, 14 How. 70.

² Lewis v. Dinkgrove, 24 La. An. 489.

³ Wells v. Smith, 13 Gray (Mass.), 207.

⁴ Calhune v. Tullas, 35 Ga. 119. A., being surety for B. in a bond, brought a bill for an injunction against a judgment at law recovered by B. against him, alleging that said debt was to be considered as paid, on the complainant’s discounting it on said bond, B. being one of certain trustees to whom the bond was given, that nine years had elapsed since said bond was made, that he was apprehensive of B.’s solvency, and praying general relief. Held, that B. should have proffered payment of the principal and interest due on the bond, made the trustees defendants, and established his claim against them, or otherwise have enabled the court to make a decree which would have extinguished the demand against B. on the bond. The bill was dismissed. Thomas v. Bush, 1 Bibb (Ky.), 506.

⁵ Gardner v. Jenkins, 14 Md. 58.

judgment for costs had been rendered against a party for non-compliance with his covenants, equity will not prevent the collection of the costs.¹

§ 103. **Errors of Trial Court and Mere Irregularities not available.** — A judgment will not be enjoined for errors and irregularities in the proceedings, the proper remedy being to correct them in the court where suit was brought, or by appeal;² for instance, where the jurisdiction of the circuit court is invoked to revise an order of the district court allowing, after a fully contested hearing, the claim of a certain creditor in bankruptcy proceedings.³ A court of equity has, under ordinary circumstances, no power to reduce an assessment of damages by a jury in an action of covenant, or to enjoin the collection of any part thereof, because the amount is greater than in justice it should be.⁴ A garnishee against whom a judgment has been obtained is not entitled to injunction to restrain the execution thereof, on a petition averring that he owes the principal defendant nothing, and that the judgment is erroneous.⁵ But equity will relieve those indirectly injured by the malfeasance of a justice of the peace before whom a case is tried.⁶

§ 104. **Same Subject.** — The recognized principle is that, an injunction upon a judgment being strictly personal, to restrain the respondent from using it unconscientiously, the authority of the court that rendered it is not thereby denied, nor is the legal-

¹ *Hill v. Gordon*, 6 J. J. Marsh. (Ky.) 520.

² *Clopton v. Carloss*, 42 Ark. 560; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 336, 337; *Simpson v. Hart*, 1 Johns. Ch. 95, 99; *Hunt v. Coachman*, 6 Rich. Eq. 286; *Railroad Co. v. Neal*, 1 Woods, 353; *Saunders v. Albritton*, 37 Ala. 687. Compare *Govener v. Barrow*, 13 Ala. 540; *Pico v. Susol*, 16 Cal. 294; *Buchan v. Summer*, 2 Barb. (N. Y.) 165; *Merrit v. Baldwin*, 6 Wis. 439; *Stokes v. Knaull*, Id. 389. See *Barr v. Carpenter*, (R. I.) 19 A. 392; *Dunn v. Fish*, 8 Blackf. (Ind.) 407; *Stanton v. Embry*, 46 Conn. 65; *Methodist P. Church v. Mayor, etc. of Baltimore*, 6 Gill (Md.), 391; *Stockton v. Briggs*, 5 Jones (N. C.) Eq. 309.

³ *Troy First National Bank v. Cooper*, 20 Wall. 171.

⁴ *Reed v. Clarke*, 4 T. B. Mon. (Ky.) 18. Where defendant tenders money into court, and the court, after giving judgment for plaintiff, wrongfully applies such money in payment of costs and part payment of plaintiff's judgment, and the plaintiff so receives it, defendant is not entitled to an injunction against proceedings by the plaintiff to enforce his judgment. *Chicago & E. I. R. Co. v. Kamman*, 119 Ill. 362; 10 N. E. 217.

⁵ *Gibson v. Cohen*, (Ga.) 11 S. E. 141.

⁶ *Austin v. Carpenter*, 2 Green (Iowa), 131.

ity of the court's action.¹ Therefore a court of chancery has no jurisdiction over the question of irregularity in a judgment at law.² Accordingly it was held that the omission to fill in the blank for taxable costs was no ground for enjoining the judgment;³ nor the fact that a second master, in a foreclosure proceeding, in the place of one who died, was appointed without notice;⁴ nor the absence of affidavits of merits required by statute;⁵ nor the fact that judgment was entered against partners in the firm name instead of their individual names, the cause of action being a partnership matter, though the suit was brought against the partners individually.⁶ So when a judgment has been docketed without first being entered upon the judgment-book, the refusal of the court to grant a temporary injunction to restrain the clerk from entering the judgment *nunc pro tunc* was within the sound legal discretion of the court.⁷ And when a clerk issues an execution without the order of the creditor, who afterwards ratifies the act, its enforcement should not be enjoined.⁸

§ 105. **Remedy at Law directed against the Execution.** — Restraining proceedings under executions prematurely and irregularly issued was once an important branch of equity jurisdiction; but the liberal provision of statutory remedies, to be obtained by application to the court, whence such executions are issued, has, to a great extent, and in most of the States, taken it away.

¹ Smith v. McLain, 11 W. Va. 654.

² Snyder v. Beals, 4 McLean, 12 ; s. p. *Ex parte Christian*, 23 Ark. 639 ; Reynolds v. Horine, 13 B. Mon. (Ky.) 234 ; Nicholson v. Patterson, 6 Humph. (Tenn.) 394 ; Burke v. Wheat, 22 Kansas, 722 ; Wagner v. Pegues, 10 S. C. 259 ; Hastings v. Cropper, 3 Del. Ch. 165.

³ Pittsburg, Cincinnati, etc. Co. v. Elwood, 79 Ind. 306.

⁴ Merritt v. Daffin, 24 Fla. 363 ; 4 So. 806.

⁵ Reiley v. Johnson, 22 Wis. 279.

⁶ McIndoe v. Hazelton, 19 Wis. 567.

⁷ Rockwood v. Davenport, 37 Minn. 533 ; 35 N. W. 377.

⁸ Clarkson v. White, 4 J. J. Marsh. (Ky.) 529. Where judgment allows a credit which, instead of being inserted in, is indorsed on the *fi. fa.* in the clerk's certificate under the seal of court, the error, if any at all, is no ground for enjoining execution for its whole amount. Rowley v. Kemp, 2 La. An. 360. A. commenced a suit against B., on a valid debt, and attached a large amount of property ; the writ was issued by a clerk who had usually issued such writs, but who, in issuing them, transcended his authority, as was afterwards decided. B. brought an action of trespass against A., and obtained judgment. A. filed a bill to enjoin the judgment. *Held*, that he was not entitled to relief. Stetson v. Goldsmith, 31 Ala. 649.

Relief may generally be obtained upon motion to quash,¹ or other motion,² or by petition,³ or by affidavit of illegality;⁴ in some cases by *supersedeas* or *certiorari* against the judgment;⁵ in others by an action at law for damages against the officer or party proceeding or acting under color of the void or irregular process.⁶ Thus injunction will not lie on the ground that an

¹ *Partin v. Luterloh*, 6 Jones (N. C.) Eq. 341; *Howell v. Thomason*, (W. Va.) 12 S. E. 1088; *Hall v. Taylor*, 18 W. Va. 544; *Logan v. Hillegass*, 16 Cal. 200; *Comstock v. Comstock*, 16 Cal. 77; *Fahs v. Roberts*, 54 Ill. 192. Motion to quash held to be the proper remedy where credits which should have been entered upon execution were omitted. *Cline v. Lowe*, 3 Ind. 527; *Morrison v. Speer*, 10 Grat. (Va.) 228. But a party who had entered himself replevin bail for an additional stay of execution, and against whom a *fi. fa.* was issued upon the judgment, after the expiration of six months, may enjoin the sale of his property taken on such execution. *Strong v. Daniel*, 5 Ind. 348.

JUSTICE'S JUDGMENT. — Where a justice's judgment is erroneous, the remedy is by appeal; where it is void, the remedy will be to set aside the execution upon motion; and where both these remedies are lost without fault, equity will restrain enforcement of the execution, if it clearly appear that the defendant has no other adequate and complete remedy at law. *Connery v. Swift*, 9 Nev. 39.

² *Wilkinson v. Rewey*, 59 Wis. 554; *Walker v. Gurley*, 83 N. C. 429; *Mayo v. Bryte*, 47 Cal. 626; *Imlay v. Carpenter*, 14 Cal. 173; *s. p. Green v. Thomas*, 17 Cal. 86; *Chambless v. Taber*, 26 Ga. 167; *New York Dock Co. v. American, etc. Ins. Co.*, 11 Paige (N. Y.), 384; *Smith v. Ryan*, 20 Tex. 661; *Day v. Cummings*, 19 Vt. 496. See also *Hone v. Woolsey*, 2 Edw. (N. Y.) 289; *White side v. Latham*, 2 Coldw. (Tenn.) 91.

³ *Driggs & Co.'s Bank v. Norwood*, 49 Ark. 136; 4 S. W. 448; *Mansf Dig. Ark. § 2988*.

⁴ *Gunn v. Woodfolk*, 66 Ga. 682; *Leonard v. Collier*, 53 Ga. 387.

⁵ *Crandall v. Bacon*, 20 Wis. 639; *Rotzein v. Cox*, 22 Tex. 62; *Mayor, etc. of New York v. Conover*, 5 Abb. (N. Y.) Pr. 171. Judgments were rendered in several cases, in each of which the return of service of summons was fatally defective. Part of them was for amounts large enough to entitle defendant to have them reviewed by *certiorari*, and part not. It was held that defendant was entitled to an injunction against executions on such of the judgments as were too small to be reviewed, but not so as to the others. *Galveston, H. & S. A. Ry. Co. v. Wave*, 74 Tex. 47; 11 S. W. 918.

⁶ *Jacks v. Bigham*, 36 Ark. 481; *Gusman v. De Poret*, 33 La. An. 333; *Geers v. Scott*, (Tex. Civ. App.) 33 S. W. 587. See also *Erickson v. Bank*, 44 Neb. 622; *Boyden v. Bragaw*, 53 N. J. Eq. 26; *Des Moines City Ry. Co. v. City of Des Moines*, 90 Iowa, 770; *Perry v. Hamilton*, 138 Ind. 271. Equity will not perpetually enjoin a party from enforcing a judgment upon the ground that the officer's return, as to the service of process on the defendant in the action in which the judgment was rendered, was false. The legal remedy by action against such officer and his bondsmen is adequate. *Walker v. Robbins*, 14 How. 584.

UNDER TAX SALE. — In *Richards v. Coon*, 13 Neb. 420, the petition stated

invalid¹ or an excessive² seizure has been made. To entitle a party to equitable relief where such legal remedies exist, he must show that it would be against conscience to execute the judgment complained of, that he has not been remiss in his own duties, and that he has been deprived of his right by some fraud, accident, or mistake.³

§ 106. **Same — Against the Judgment.** — In addition to the established common-law remedies⁴ for obtaining rectification of judgments erroneously or irregularly rendered and entered, various means for obtaining relief in the same court have been

that plaintiff was the owner of certain real estate by tax deeds, and that defendants held a prior judgment, which was a lien upon the land prior to the tax sale and conveyance, and complainant sought to enjoin an execution sale thereof. It was held that the petition did not state a cause of action, and that defendants had a right to complete the sale, and contest the validity of the tax deeds in a suit at law. Equity would not enjoin a sale under the execution unless some equitable ground existed for its interference.

EXECUTION FROM OFFICE OF COMPTROLLER. — The sureties of a defaulting tax collector applied for an injunction to restrain the collection of an execution, issued by the comptroller-general, against them and their principal. *Held*, that, if the complainants were entitled to relief, they had as ample remedy at law as in equity, and that the injunction was properly refused. *Gunby v. Bell*, 40 Ga. 134. Levy of execution on goods of party other than defendant, see *Markley v. Rand*, 12 Cal. 275. Incumbrancer of personalty not entitled to injunction: has legal remedy. *Rollins v. Hess*, 27 W. Va. 570. Where a sheriff levied a *fi. fa.* upon the lands of a deceased debtor, founded on a judgment recovered during the life of the debtor, without a *sci. fa.* upon the judgment, the court refused to relieve, on the ground that there was a remedy at law. *Perkins v. Bullinger*, 1 Hayw. (N. C.) 367.

WARRANTY OF TITLE; PRIOR JUDGMENT LIENS. — A grantor conveyed by warranty, and with covenant that the land "shall not be subject to any liability from incumbrances now thereon," when at the time there were recorded judgment liens on the land. *Held*, that equity would not enjoin the collection of a judgment for purchase-money against the grantee, unless the bill showed that the grantor had no other lands sufficient to satisfy the judgment liens, or was pecuniarily unable to pay them. *Wamsley v. Stalnaker*, 24 W. Va. 214.

SALE OF EXEMPT PROPERTY. — A suit in equity cannot be maintained for the purpose of enjoining the levy and sale of personal property under an execution, and for the recovery of damages for the detention, on the ground that the property is exempt from such levy. Ample redress may be had at law. *Bryan v. Long*, 14 Fla. 366.

¹ *Gusman v. De Poret*, 33 La. An. 333.

² *Hefner v. Hesse*, 39 La. An. 149.

³ *Davis v. Staples*, 45 Mo. 567. See also *Williams' Heirs v. Douglass*, 17 So. 805; 47 La. An. 1277.

⁴ *Clay v. Cheftall*, T. U. P. Charlt. (Ga.) 263. See also *Martin v. Orr*, 96 Ind. 27.

provided by statute. Before a party can invoke interposition by a court of equity he will be required to show that, through fraud, accident, or mistake, he has been deprived of the benefit of such method of redress appropriate to his case. Otherwise the remedy of a defendant aggrieved by a judgment is not by injunction, but by an application to the court wherein the judgment was rendered for relief.¹ Nor will a judgment be enjoined where a direct proceeding to reverse it might have been instituted.² One in possession of land, and claiming as owner, is not entitled to restrain by injunction a sale of such land under execution sued out by a creditor of his grantor, under the assumption that the title of the party in possession is fraudulent as to creditors. The *bona fides* of the conveyance can be fully tested, and the rights of all claimants settled, in a suit by the purchaser at an execution sale to recover the land.³ A court of equity will not grant an injunction or a new trial by way of relief against a judgment at law obtained by fraud, in a case where the party seeking relief has an adequate remedy by application to the court in which the fraud was perpetrated.⁴ Nor can one who

¹ *Chambers v. Penland*, 78 N. C. 53; *Parker v. Bledsoe*, 87 N. C. 221; *Harding v. Hawkins*, (Ill. Sup.) 31 N. E. 307.

² *Gould v. Laughran*, 19 Neb. 392. Where judgment is rendered upon a stipulation of counsel made in contravention of defendant's instructions to his attorney, he has an adequate remedy by a motion to vacate under the Washington Code, and equity will not take jurisdiction of a bill to enjoin the execution of the judgment filed before the time within which a motion to vacate could have been made had expired. *Cowley v. Northern Pac. R. Co.*, 46 F. 325.

³ *Southerland v. Harper*, 88 N. C. 200.

In Louisiana, where the plaintiffs are mere ordinary creditors of the succession, their action is a personal one against each one of the heirs, to recover from him his several share of his ancestor's debt, and the plaintiffs have no legal right to stay, by injunction, a defendant's order of seizure and sale. Even privileged or mortgage creditors cannot arrest execution, but must resort to the remedy by third opposition, to stay the proceeds of sale in the sheriff's hands until the conflicting rights of preference to the fund can be determined. *White v. Blanchard*, 19 La. An. 59. The existence of a privilege or mortgage upon property seized under a *fi. fa.* will not authorize an injunction to arrest its sale; the remedy is by third opposition. *Wallis v. Bourg*, 14 La. An. 104.

In Maryland, where a party to a proceeding in the orphans' court fails to exercise his right to demand plenary proceedings, or to have issues sent to the circuit court for trial, a court of equity will not grant an injunction to restrain the execution of an order issued in such proceeding by the orphans' court upon a matter within its jurisdiction. *Bett v. Blackburn*, 28 Md. 227.

⁴ *Lyme v. Allen*, 51 N. H. 242.

complains that a judgment was rendered against him in the supreme court after the appeal had in reality been dismissed, have the execution of the judgment restrained by proceeding in another court. He should apply to the supreme court to have the judgment set aside.¹ But an injunction will issue to prevent the sale of public-school property upon execution, although there is an adequate remedy at law.² And one chancery court in Tennessee may enjoin execution of a judgment taken upon a forged note by motion in another chancery court without notice to the maker. A writ of error *coram nobis* is also a proper remedy.³ In Iowa an injunction will not issue against a judgment at law, nor within a year after its rendition, upon grounds which authorize the granting of a new trial under the statute.⁴

Upon considerations of public interest and convenience courts of equity will not enjoin the enforcement of judgments rendered in favor of municipal corporations for street assessments, except upon a plain case of imposition and fraud by which a party was deprived of his legal right to make defence and pursue his legal remedies for a correction of errors.⁵

§ 107. **Same — By Appeal or Writ of Error.** — A party who has been duly served with process and had judgment rendered against him, is not entitled to an injunction against such judgment on account of any matters which might have been re-examined on appeal or writ of error. If errors have been committed in the trial court and he has failed to appeal or to join in the appeal taken by the plaintiff, he thereby acquiesces in the judgment, and cannot, after the court has affirmed the judgment and the plaintiff is proceeding to execute it, enjoin its execution;⁶ and if the court refuse to admit the defence, and

¹ *Phelan v. Johnson*, (Iowa) 46 N. W. 68. Injunction will not lie to restrain the enforcement of a judgment alleged to have been irregularly affirmed on certificate in the supreme court, in violation of an agreement of settlement, in consequence of which the appeal was abandoned, when it appears that there is still time to set aside the affirmance at the term at which it was entered. *J. A. Roebling Sons Co. v. Stevens Electric Light Co.*, (Ala.) 9 So. 369.

² *State v. Tiedemann*, 69 Mo. 306.

³ *Douglas v. Joyner*, 57 Tenn. 32.

⁴ *Hintrager v. Sumbargo*, 54 Iowa, 604.

⁵ *Ewing v. St. Louis*, 5 Wall. 413.

⁶ *Savoie v. Thibodaux*, 29 La. 149; *Earl v. Matheney*, 60 Ind. 202; *Eyster's Appeal*, 65 Pa. St. 473; *Murdock v. De Vries*, 37 Cal. 527; *Kendrick v. Rice*,

renders judgment for the plaintiff, that does not alter the rule. The defendant's remedy is not a bill in chancery to enjoin the judgment, but an appeal or writ of error.¹

§ 108. **Same — Diligence in seeking Relief in Appellate Court.** — If complainant bases his claim to equitable relief on fraud, accident, or mistake, by which the taking of an appeal or suing out a writ of error was delayed, he must make it appear that his failure was entirely due thereto, and that it was in no wise caused by his own laches. Thus, in a suit to enjoin a judgment the bill alleged that, by reason of the resignation of the justice by whom it was rendered, plaintiff was prevented from perfecting his appeal; but it appeared, that, of the thirty days allowed within which to perfect the appeal, eighteen were allowed to elapse before any steps were taken to do so. It was held that this alone was not sufficient to confer jurisdiction on a court of equity to interfere with the judgment.² But in another case a judgment of a New York City district court was dated and was entered by the clerk as of August 24th, which was within the statutory eight days after final submission, but in fact the judgment was not filed with the clerk until August 27th, which was too late. The defendant therein had no actual notice of the

16 Tex. 254; Cen. Iowa Ry. Co. v. Piersol, 65 Ia. 498; Parsons v. Pierson, (Ind.) 28 N. E. 97; Robb v. Halsey, 19 Miss. (10 Smed. & M.) 140; Flanniken v. Wright, 64 Miss. 217; 1 So. 157. The fact that the appellate power in certain cases is vested by statute in the court of common pleas necessarily prevents a court of equity from granting relief in such cases against the execution of an erroneous judgment of the inferior court. Miller v. Duvall, 26 Md. 47. The form of entry of a judgment is immaterial, so far as concerns the powers of a court of equity; and error therein must be corrected by appeal, not by proceedings in equity. Hunter v. Hoole, 17 Cal. 418.

¹ Dunn v. Fish, 8 Blackf. (Ind.) 407; Graham v. Roberts, 1 Head (Tenn.), 56; Rockwell v. Tupper, 7 Pa. Super. Ct. 174; Geraty v. Druiding, 44 Ill. App. 440. Where, therefore, in an action at law for the breach of a contract, the breach assigned was the removal of certain machinery, which by the terms of the contract the defendant was bound to leave on the premises, the defendant offered to prove that the contract was rescinded by mutual consent, and that the plaintiff agreed to allow the defendant to remove the machinery, and the court held the evidence inadmissible, whereby a verdict and judgment passed against the defendant, — *held*, that he had no claim to relief against this error in a court of equity. Stockton v. Briggs, 5 Jones (N. C.) Eq. 309.

² Galbraith v. Barnard, (Or.) 26 P. 1110. See also Fleming v. Nunn, 61 Miss. 603. That judgment in an action at law was entered after the death of the complainant is not ground for an injunction, and a demurrer to a bill for that purpose will be sustained; the remedy in such case is by writ of error *coram nobis*. Williamson v. Appleberry, 1 Hen. & M. (Va.) 206.

facts until September 15th, when the plaintiff issued execution. It was then too late to appeal from the judgment, if the true date thereof was August 24th. It was held that the proceedings thereon should be enjoined.¹ But where there was a trial at law, and a party moved for a new trial on ground of surprise and for other causes examinable at law, the motion being denied and no exceptions taken, it was held the court of chancery had no jurisdiction to grant relief, — the laches of a party laying no foundation for the interference of equity.²

It will require a very strong case to justify the issuing of an injunction to restrain a judgment rendered by confession on a debt due for more than thirty years, from which no appeal has been taken.³

§ 109. **Same — Judgment in Justice's Court.** — Usually the enforcement of a justice's judgment unappealed from will not be enjoined, unless defendant, without his negligence, has been hindered by fraud or accident from availing himself of his defence.⁴ But when a void judgment in a justice's court is for a sum so small that no appeal or *certiorari* can be prosecuted to set it aside, an injunction is the only remedy.⁵ And in a proper case an injunction will lie to restrain proceedings on a judgment at law, notwithstanding the pendency of a writ of error thereon.⁶

§ 110. **Existence of Legal Remedy no Objection where Injunction ancillary to other Relief.** — Though, as we have seen, the existence of a legal remedy is a sufficient reason for administer-

¹ *Patterson v. Naehr*, 6 N. Y. S. 513.

² *Hendrickson v. Hinkley*, 5 McLean, 211.

³ *Gravely v. Southerland*, 29 Ga. 335. Two judgments were rendered on confession before a justice of the peace, no warrants having been issued or served on the defendants. On a bill for injunction to restrain executions, it was held that relief for such an objection to the judgments should be sought at law, by appeal to the county court, and that equity could furnish no relief. *Brumbaugh v. Schnebly*, 2 Md. 320.

⁴ *Kelleher v. Boden*, 55 Mich. 295.

⁵ *Gulf, C. & S. F. Ry. Co. v. Rawlings*, 80 Tex. 579; 16 S. W. 430. An injunction refused against judgments and actions at law, some erroneously rendered, others threatened, against the trustees of an association (instead of the association itself), there being a clear right of appeal, or *certiorari*. *Wolf v. Schleiffer*, 2 Brews. (Pa.) 563. An execution issued against the separate estate of a married woman upon the finding of a justice of the peace will not be summarily stricken off, nor the collection thereof enjoined, the proper remedy being by appeal. *Fenstermacher v. Xander*, 116 Pa. 41; 10 A. 128.

⁶ *Parker v. Maryland Circuit Court Judges*, 12 Wheat. 561.

ing primary relief by injunction, yet equity, once having jurisdiction of a case, may, as an incident to the relief granted, enjoin the enforcement of a judgment at law rendered in an action which might have been successfully defended at law.¹

It is held in Alabama that the statutory remedy by motion to supersede an execution on a judgment, does not deprive the chancery court of its original jurisdiction to remove a cloud upon the title to land. Therefore a vendee, whose land has been sold under execution (issued on a judgment recovered against his vendor, before his purchase), and bought in by himself, may come into equity to enjoin the collection of his bid and all further proceedings under the judgment, upon an allegation that the judgment has been paid and satisfied before the issue of the execution.²

§ 111. *Relief refused where Matter urged res adjudicata.*³ — A court of chancery cannot enter into a case which has already been investigated in a court of law, according to the ordinary rules of investigation in such court, merely on the ground that injustice has been done.⁴ Therefore a bill to restrain the collection of a judgment will be dismissed when it appears that every question involved was litigated in the action in which the judgment was obtained.⁵ And when a cause which is exclusively of legal jurisdiction has been tried at law, and a judgment ren-

¹ McDowell v. McDowell, 114 Ill. 255.

² Brewer v. Branch Bank at Montgomery, 24 Ala. 439.

³ "Adjudicata" with "res" is English-Latin. The Romans said "res judicata."

⁴ Vaughn v. Johnson, 9 N. J. Eq. (1 Stock.) 173; Continental Life Ins. Co. v. Carrier, 58 Vt. 229; Brown v. Wilson, 56 Ga. 534; Arrington v. Washington, 14 Ark. 218.

FORECLOSURE OF MORTGAGE. — The question of plaintiff's liability for any deficiency upon a foreclosure sale of mortgaged premises, having been put in issue by the complaint and his answer in the foreclosure suit, and determined against him by the judgment, he cannot have that question retried by a suit to restrain the enforcement of the judgment. Ketchum v. Breed, 54 Wis. 131. See also Haynes v. O'Neil, 30 La. An. Part II. 1238.

⁵ Amey v. Calkins, (N. J.) 19 A. 388; Dellaven v. Covalt, 83 Ind. 344; Forsythe v. McCreight, 10 Rich. (S. C.) Eq. 308; Dyson v. Leek, 2 Strobb. (S. C.) Eq. 239; Continental Life Ins. Co. v. Carrier, 58 Vt. 229; 4 A. 866.

SUBSEQUENT DECISION OF LAND OFFICE. — A judgment of ejectment by default against the widow of a man who died in possession of land to which he had a title, the land office having declared all rights terminated, will not be enjoined because the default was suffered prior to the decision by the land office. Kirby v. Kirby, 70 Ala. 370.

dered against the defendant, and it does not appear that there was any fraud or concealment by the plaintiff at law or that it was obtained through inevitable accident or mistake, a court of chancery has no jurisdiction to interfere to relieve the defendant.¹ Where a defence has been made to a suit at law, the defendant thus elects the tribunal before which he will make his defence; and from that time, he must make his entire defence in that court, if such as may be heard by it.² Nor will a court of equity interfere by injunction to restrain a judgment at law, for causes which on motion for a new trial at law were held insufficient.³ An injunction will not be granted to restrain the execution of a writ of possession, based on alleged error in the judgment on which the execution issued, and on a judgment in complainant's favor for possession of a tract of land of which the land in question is a part, the final decision of which is pending on appeal.⁴ Under a statute which makes the judgment of a justice of the peace final where the amount in controversy is less than twenty dollars, such a judgment cannot be reviewed by means of an application to a superior court for an injunction restraining the enforcement of the judgment, when it appears that every defence which the applicant for the injunction had the right to urge might have been proved in the suit in the justice's court.⁵ This rule is based no less upon the

¹ *White v. Chal*, 2 Swan (Tenn.), 550; *Burton v. Wiley*, 26 Vt. 430.

TRIAL OF TITLE TO REAL PROPERTY. — Where a party first submits to try at law, with a knowledge of the fact upon which he rests in support of his title, and a verdict is rendered against him, he cannot then come into equity and file his bill for discovery and relief, and enjoin the operation of the verdict until he can have another trial in equity in attempting to perfect his title. *Donaldson v. Kendell*, 2 Ga. Dec. 227.

² *Dickson v. Richardson*, 16 Ark. 114; *Holmes v. Steele*, 28 N. J. Eq. 173; *Marine Insurance Co. v. Hodgson*, 7 Cranch, 332.

PROBATE OF WILL. — A. offers for probate a paper as the will of B., in which he is made executor, and a legacy is given to him. Upon trial, the jury found a verdict against the alleged will. A bill in equity is filed by C. to set aside this verdict, and to be allowed to prove, as the will of B., all that part of the paper in which A. has no interest, the bill alleging that the verdict obtained was fraudulent and void. A. was not made a party thereto. *Held*, that there was no equity in the bill. *Barksdale v. Brown*, 16 Ga. 95.

³ *Matson v. Field*, 10 Mo. 100; *Collins v. Butler*, 14 Cal. 223.

⁴ *Rosenberger v. Bowen*, 84 Va. 660, 675; 5 S. E. 697.

⁵ *Odum v. McMahon*, 67 Tex. 292; 3 S. W. 286. See also *Halcomb v. Kelly*, 57 Tex. 618.

MATTERS RES ADJUDICATA ON EXECUTION. — Upon an application to

doctrine of estoppel than upon the policy of putting an end to litigation.¹

§ 112. **Same — When Rule applies to Equitable Defences.** — If by the constitution and statutes of a state prescribing and fixing jurisdiction, causes of action and defences both legal and equitable may be joined and passed upon in the same tribunal and in the same proceeding, then there is no exception to the general rule stated in the last preceding section in favor of defences that are purely equitable; but it is otherwise where no such system has been established. Under such system the rule is as applicable where the application for relief is made to the equity side of the court, as if made to a separate court under the former system. Thus, where pending an appeal by defendants they filed a bill on the equity side of the court, setting up the proceedings under the petition and the equitable matters relied upon by them, and asked that the proceedings under the judgment be enjoined, and for a decree according to the equities of the case as they should appear, it was held, that the law court should afford adequate relief in the premises, and that the bill should be dismissed.²

§ 113. **Cases where the Rule does not apply.** — A matter which could not have been determined at law, in which the interposition of equity is asked, is not within the estoppel of the legal decision.³ And while a court of equity will not re-examine and re-adjust settlements which have been made by compromise judgments in courts of law having jurisdiction of the subject-matter, yet a compromise judgment, if it be obtained by fraud, accident, or mistake, will be relieved against.⁴

The rule that a judgment silences all defences which might have been urged against its rendition cannot be invoked in an action to enjoin its execution for fraud, when the fraud alleged consists in acts of the party which prevented his adversary from setting up his defences.⁵ And a defendant who disputes plain-

restrain a sale under an execution, matters at issue and adjudicated upon in the original suit cannot be reopened on the ground of newly discovered evidence. *Gusman v. De Poret*, 33 La. An. 333. See also *Frauenthal's Appeal*, 100 Pa. St. 290.

¹ See *Lucas v. Bank of Darien*, 2 Stew. (Ala.) 280.

² *Hopkins v. Medley*, 99 Ill. 509.

³ *White v. Crew*, 16 Ga. 416.

⁴ *Hahn v. Hart*, 12 B. Mon. (Ky.) 426.

⁵ *Lazarus v. McGuirk*, (La.) 8 So. 253.

tiff's claim *in toto*, may decline to set up a claim though liquidated by note. If afterwards the respective claims of the parties are established by judgments, compensation takes place by operation of law, and if either sues out execution, an injunction lies.¹ On the same principle a judgment in favor of one against his co-surety on a draft for contribution will not bar a bill by such co-surety to enjoin the judgment for equitable reasons involving new issues and new parties which were not before the court in the common-law suit.²

§ 114. **Perjury of Witnesses or Misconduct of Jury.** — Chancery will not generally interfere with a judgment at law, on the ground that it was obtained through the erroneous statements of witnesses,³ or misconduct or mistakes of the jury⁴ on the trial. The reasons for non-interference on these grounds are too obvious to require their being stated. But in an early Tennessee case an injunction was granted, on the ground of improper practice by the plaintiff with the jury, and an issue was directed to ascertain the justice of the plaintiff's demand.⁵

§ 115. **Not granted where only Title to Personalty involved.** — The title to personal property cannot be tried by injunction. Therefore, where a sheriff levied upon certain personal property, which had been allotted to the defendant in the execution as his personal property exemption, and remained in his possession, and was restrained by injunction from selling the same, the granting of the injunction was held to be error.⁶ For the same reason chancery will not grant an injunction to prevent the execution of a writ of replevin.⁷ Nor will a court of equity lend its aid by injunction to settle conflicting claims to portions of personal estate in dispute between distributees, legatees, and creditors, under a decree.⁸

§ 116. **Good Defence must be shown.** — As a general rule,

¹ *Ellis v. Fisher*, 10 La. An. 479.

² *Simmons v. Camp*, 65 Ga. 673.

³ *Vaughn v. Johnson*, 9 N. J. Eq. (1 Stock.) 173; *Driskill v. Cobb*, 66 Ga. 649.

⁴ *Rust v. Ware*, 6 Grat. (Va.) 50.

⁵ *Humphries v. Blevins*, 1 Overt. (Tenn.) 36. To obtain relief on the ground of perjury, the bill should state the names of the witnesses who swore falsely, and set forth facts tending to show that their testimony was false. *Kersey v. Rash*, 3 Del. Ch. 321.

⁶ *Baxter v. Baxter*, 77 N. C. 118.

⁷ *Glenn v. Fowler*, 8 Gill & J. (Md.) 340.

⁸ *Maxwell v. Maxwell*, R. M. Charlt. (Ga.) 462.

before equity will restrain the collection of a judgment rendered by a court of competent jurisdiction, after legal and personal service, it must affirmatively appear that there is a valid defence to the cause of action.¹ And an allegation in general terms that complainant has a defence is not sufficient. The facts constituting such defence must be stated. Thus, where the judgment debtor sought an injunction on the ground of usury in the notes, not alleging the amount of the usury nor tendering the amount actually due, it was held that no ground for an injunction was stated.²

§ 117. **Same — No Notice to Defendant; Conflicting Decisions.** — Whether a complainant against whom a judgment has been rendered without notice, or without notice until too late to set the same aside by motion in the same court, and appeal from an adverse decision on such motion, is entitled to an injunction without a statement of the facts constituting his defence, is not entirely free from doubt upon the authorities; but the sounder doctrine, without regard to the weight of authority, would seem to be that a complainant in such case should not be required to set forth the facts constituting his defence, thus acquainting his opponent with the grounds upon which he relies to defeat a new proceeding without ever having had a day in court. In the federal court³ in Virginia,⁴ Connecticut,⁵ and Tennessee,⁶ the justness of this view is recognized and given effect; while in Indiana,⁷ Illinois,⁸ California,⁹ and Texas,¹⁰ — owing principally

¹ *Muse v. Wafer*, 29 Kan. 279; *Davis v. Delaware Poor Overseer*, 40 N. J. Eq. 158; *Anglecey v. Colgan*, 44 N. J. Eq. 203; 9 A. 105; *Sauer v. Kansas*, 69 Mo. 46. See *Farrington v. Brown*, 65 Cal. 320. A defendant, whose counsel was elected to the bench, heard the court announce at the next term that no case in which he had been employed would be tried. The defendant went away and was defaulted. *Held*, that in the absence of any substantial defence he was not entitled to an injunction. *Cordin v. Jones*, 23 Ga. 175.

² *Neurath v. Hecht*, 62 Md. 221; *Rohrer v. Fay*, 3 McArthur (D. C.), 145.

³ *Mills v. Scott*, 43 F. 452.

⁴ *Finney v. Clark*, 86 Va. 354; 10 S. E. 569.

⁵ *Blakeslee v. Murphy*, 44 Conn. 118.

⁶ *Bell v. Williams*, 1 Head (Tenn.), 229. But where a defendant misnamed in the process is in court when the judgment is rendered against him by default, and fails to defend, by advice of his counsel, equity will not relieve him by enjoining the judgment. *Graham v. Roberts*, 1 Head (Tenn.), 56.

⁷ *Williams v. Hitzie*, 83 Ind. 303.

⁸ *Virginia v. Dunaway*, 17 Ill. App. 68. Compare *Owens v. Ranstead*, 22 Ill. 161.

⁹ *Harnish v. Beamer*, 71 Cal. 155; 11 P. 888.

¹⁰ *Sharp v. Schmidt*, 62 Tex. 268.

in one or two of the last mentioned states to existing statutory provisions abridging the jurisdiction by injunction, — a contrary view is taken.

§ 118. **Substantial Interest must be shown.** — A stranger to a judgment cannot enjoin it because of alleged errors in its rendition, nor have an order to afford him an opportunity of showing error.¹ Thus a judgment against a married woman, not impugned for fraud or malpractice, cannot be enjoined because of a debt not inuring to her benefit, though such defence if pleaded might have defeated the action.² So a court of equity will not grant an injunction to restrain a sheriff from executing a writ of restitution issued upon a judgment in ejectment, when the petitioner for the injunction was not a party to the judgment, and the defendant in the judgment is not in possession of the premises.³ Nor will an injunction be granted where the interest which a party once had in the matter has terminated. Thus a provisional injunction was denied to restrain the plaintiff in an action at law from enforcing a judgment, where it appeared that between the filing of the bill and the time of the application for the injunction, the judgment had been enforced by execution.⁴ And where the sureties of a purchaser under a decree of a court having jurisdiction of the subject, in a case where the report of the commissioners appointed to sell had been confirmed, brought a bill in equity for relief against a judgment on the bond for the money, on the ground of error in the decree, or the proceedings under it, the bill was held properly dismissed.⁵ So the interest of a party may be trivial, and cognizance of it refused for that reason.⁶

§ 119. **Same — Creditors; Fraudulent Assignments.** — Under a statute relating to general assignments, a court of equity powers

¹ *Mayer v. Woodhull*, 35 Tex. 687.

² *Hall v. Carroll*, 10 La. An. 412.

³ *Tevis v. Ellis*, 25 Cal. 515.

⁴ *Kamm v. Stark*, 1 Sawyer, 547.

⁵ *Worsham v. Hardaway*, 5 Grat. (Va.) 60.

⁶ See *Yantes v. Burdett*, 8 Mo. 457, where it was held that for the sums of \$2 and \$10 a court of chancery will not allow a judgment at law to be stayed, unless in case of the grossest fraud. Under Rev. Stat. "Courts," sec. 29, compared with Rev. Stat. "Injunction," sec. 8, an injunction ought not to issue to restrain the collection of a judgment exceeding \$20, on which only a balance less than \$20 remains uncollected. *Breckenridge v. McCormick*, 43 Ill. 491.

has no jurisdiction of a suit by creditors to enjoin the sheriff from paying the proceeds of certain executions to the plaintiffs therein, on the ground that the judgments on which they were issued were fraudulently confessed by the debtor in contemplation of an assignment, since such property is not in the possession of the court, but held adversely by the sheriff.¹ But where a creditor's bill charged that the defendant, pending a suit at law by the plaintiff, confessed a judgment to another person, for a debt not due, and which was fully secured, an injunction to stay proceedings upon the judgment was granted, without a deposit of security by the plaintiff.²

§ 120. *Same — Interests in Real Estate the Subject of Litigation.* — An injunction which had been obtained to restrain the sale of land previously conveyed by plaintiff with covenants of warranty, the judgment having been obtained previous to the conveyance, was held properly dissolved, as plaintiff had no interest in the property.³ So where a party had recovered a judgment against another whose land was sold under it, it was held that one who became the owner by purchase from the purchaser at the execution sale, could not enjoin the sheriff from executing a deed to the purchaser at the sale on the ground that the record did not show service on the defendant in the action.⁴ But a grantor of real estate conveying by deed, with full covenants of warranty, has such an interest in restraining the sale of the land on an execution issued upon a judgment against a

¹ *Lindaur v. Lang*, 29 Ill. App. 188.

² *Burns v. Morse*, 6 Paige (N. Y.), 108. In *Memphis Grocery Co. v. Trotter*, (Miss.) 7 So. 550, one T., a merchant, drew \$17,000 from the bank, and visited his father the same day. The latter was a small merchant in a neighboring town. The next day T. made an assignment for the benefit of creditors. His property was attached and sold. His father settled with some of the creditors, and took judgments against T. It was held that, in view of many circumstances connecting the father with the fraud of T., the sheriff would be enjoined from paying to the father on his judgments the money derived from the sale of T.'s goods.

³ *Small v. Somerville*, 58 Iowa, 362.

⁴ *Colby v. Brown*, 10 Neb. 413. See also *Weichel v. Gordon*, 63 Ga. 610. The vendees of a tract of land enjoined an order of seizure and sale, sued out to enforce the payment of notes due their vendors and secured by mortgage on the property. The petition for injunction stated that the vendors of the plaintiff became parties to the suit, and adopted the allegations of the petition. Held, that the plaintiff's vendors could not be considered parties to the suit, as they had neither taken the oath, nor given the bond required by law to obtain an injunction. *Chambliss v. Miller*, 15 La. An. 713.

prior grantor, alleged to have been paid, as to entitle him to be made a party to a suit instituted for that purpose. His liability to his grantee is in danger of becoming fixed by the sale under the execution.¹ And a mortgagor may have the mortgagee restrained by injunction from proceeding at law to sell the equity of redemption in the mortgaged premises.²

§ 121. **Resulting Injury must be shown.** — From the rule that a party applying for relief by injunction must show substantial interest in the matter litigated, follows necessarily another, that complainant will not be entitled to relief although he show the judgment to be unjust and inequitable, unless he also make it appear that he will be materially injured by it unless its enforcement be arrested. Where no special facts or circumstances are disclosed showing that prejudice or injury is likely to result to the plaintiff, an injunction will not be granted.³ On this principle a court of equity has no jurisdiction to enjoin a judgment at law, merely because the process from that court has not been served on the defendant. It is necessary further to show that the party, by the irregularity, has been precluded from urging a valid defence.⁴

§ 122. **Same — Interests in Real Estate.** — An injunction will not be granted restraining the sale of land, under a judgment, on the ground that the plaintiff is the holder of a mortgage which is a prior lien on the land, it not being shown that the sale will not be made subject to the lien of the mortgage.⁵ Nor will the court restrain the sale of land on execution at the instance of a claimant, under a tax title which clearly is invalid.⁶ On the same principle a court of equity will refuse to relieve against a judgment at law recovered on a bond condi-

¹ *McCulloch v. Hollingsworth*, 27 Ind. 115.

² *Severns v. Woolston*, 4 N. J. Eq. (3 Green) 220; *Van Meter v. Conover*, 18 N. J. Eq. 38.

³ *Wickham v. Davis*, 24 Minn. 167. In this case an injunction was refused on the suit of one partner to enjoin a sheriff from proceedings with a levy upon goods of a firm in favor of a creditor of an individual partner, even though the firm was known to be insolvent. See also *Crenshaw v. Wickersham*, 15 Iowa, 154.

⁴ *Secor v. Woodward*, 8 Ala. 500; *Crafts v. Brooks*, Id. 767; *Gregory v. Ford*, 14 Cal. 138; *Lucas v. Waller*, 1 Morr. (Iowa) 803; *Coon v. Jones*, 10 Iowa, 131; *Ableman v. Roth*, 12 Wis. 81; *Gwies v. Campbell*, 20 Iowa, 79.

⁵ *Ruthven v. Mast*, 55 Iowa, 715.

⁶ *Hall v. Theisen*, 61 Cal. 524.

tioned for the conveyance of land, where no damage has been occasioned, but a lapse of time only, if the judgment has been fairly obtained by the mere negligence of the defendant. The fact that the obligee has kept possession of the land since the judgment, and has leased and offered to sell it, does not entitle the obligor to relief, as the former is entitled to hold the land until repayment of the purchase-money.¹ And it was held that the mere fact that one had acquired title under the judgment did not entitle him to enjoin the execution sale. He must show that the sale will defeat his title, or embarrass him in prosecuting his legal remedies for injury to the possession.²

§ 123. **Same — Interests of Creditors.** — A junior judgment creditor who has bought certain land of his debtor at an execution sale, cannot enjoin a senior judgment creditor from selling the same land on execution, unless he shows that the debtor owns other property, or that the senior creditor has acted so as to prevent him from levying on said land.³ Nor will equity enjoin a creditor from levying on land in which he avers that his debtor has an interest.⁴ An injunction will not be granted to restrain a sheriff from proceeding under a levy, at the instance of the judgment debtor's assignee for the benefit of creditors, no ground for the injunction being stated except that the remedy at law would cause delay.⁵ The fact that a judgment against a garnishee was rendered upon evidence insufficient as a matter of law, is no ground on which another claimant of the fund can have an injunction, as the judgment does not conclude the right of a claimant not a party thereto.⁶ But equity will relieve against a judgment at law, on bonds given for the indemnity of the obligee as indorser of notes drawn by the obligor, the obligee having been otherwise indemnified.⁷

¹ *Oldham v. Woods*, 3 T. B. Mon. (Ky.) 47.

² *Whitman v. Willis*, 51 Tex. 429.

MECHANIC'S LIEN. — OWNER NOT A PARTY. — A sheriff's sale of land to enforce a judgment subjecting it to a mechanic's lien will not be enjoined at the suit of the owner, who did not contract for the erection of the building, and who was not made a party to the mechanic's lien proceeding, as the purchaser at the sale will acquire no title as against him. *McCormick v. Riddle*, 10 Mont. 467; 26 P. 202.

³ *Wood v. Rice*, 68 Ind. 320.

⁴ *Walker's Appeal*, 112 Pa. St. 579.

⁵ *Chittenden v. Davidson*, 52 N. Y. Super. Ct. 421.

⁶ *Rotzein v. Cox*, 22 Tex. 62.

⁷ *Scott v. Shreeve*, 12 Wheat. 605.

§ 124. **Further Illustrations — Infant, Surety; Division of Action.** — A bill which seeks to enjoin the collection of a judgment on the ground that complainant was an infant at the time of the judgment, and no guardian *ad litem* was appointed for him in the suit, and which does not set forth the cause of action upon which the judgment was rendered, or allege that the judgment is unjust, is demurrable.¹

So, where A. as principal, and B. as surety, gave a note on an executory contract for the purchase of real property, in which a fraud was practised on A., it was held that a bill filed by B. alone, praying for an injunction to stay an execution at law, and setting up no other equity, was defective in substance.²

That a debt was divided and suits brought on each portion in a justice's court which would have no jurisdiction over one suit for the whole amount, is no reason for enjoining the judgment in one suit, unless it also appears that by means of the division the defendant was deprived of some right or remedy, and that he had not consented to the division.³

§ 125. **Judgments confessed subject to Ordinary Rules.** — Questions of jurisdiction and objections based upon non-compliance with essential forms can seldom be raised in suits to enjoin confessed judgments. Whether the judgment be by confession or otherwise it will not be restrained by injunction on grounds purely legal, unless a defence at law has been prevented by fraud on the one side, or ignorance of facts unmixed with negligence on the other.⁴ An injunction will not lie to stay the

¹ *Lemon v. Sweeney*, 8 Ill. App. 507.

² *Emmons v. McKesson*, 5 Jones (N. C.) Eq. 92. An injunction against a judgment, on the ground that the defeated party was misled as to the time of the adjournment of the term, so that he was prevented from obtaining an order giving time after adjournment to make up a statement of facts, should not be granted unless it appear that the judgment would probably have been reversed on appeal. *Ratto v. Levy*, 63 Tex. 278.

³ *Pryor v. Emerson*, 22 Tex. 162.

⁴ *Harner v. Price*, 17 W. Va. 523.

TWELVE MONTHS' BOND. — An injunction will not be granted against an execution issued on a 12 months' bond, on the ground that the execution had been issued without authority of any court of jurisdiction, and without the sanction of the judicial tribunals of the land; nor will such injunction be granted upon an allegation that the complainants "are informed and believe that the bond on which said execution was issued was not taken in conformity with law, and is not such a one as execution could issue on." *Bryan v. Knight*, 1 Tex. 180.

execution of a judgment that has been rendered by the confession or consent of the attorneys of record to the suit, if the evidence shows that the attorneys were authorized to file the answer which formed the basis of the consent judgment.¹ But where a warrant of attorney to confess a judgment is obtained by the misconduct of the plaintiff, equity will entertain a bill to set aside the judgment.² In order to induce a court of equity to declare a judgment confessed for a certain amount, to be merely collateral security for whatever sum might be found due from the defendant to the plaintiff, it must be well satisfied that such was the agreement of the parties; but upon being so satisfied it will enjoin the enforcement of such a judgment, on the ground that to enforce it would be a fraud on the defendant.³

¹ *King v. Watts*, 23 La. An. 568. A. obtained judgment against B. in the district court, in September, 1850, upon confession, under a warrant of attorney, and let it lie until March, 1859, when he obtained from the court an order for the issue of execution thereon. B. moved to set aside the execution for irregularity in the entry of the judgment, but was refused. Afterwards his successor in interest, upon whose property the execution had been levied, enjoined the sale and sought to have the judgment declared a nullity, for irregularity in the entry, and as not being a lien upon the property. *Held*, that the judgment was good until reversed upon appeal or writ of error, or unless relieved against within a year from its rendition, on the ground of mistake, inadvertence, surprise, or excusable neglect of B. *Marshall v. Hart*, 4 Minn. 450.

² *Truett v. Wainwright*, 9 Ill. (4 Gilm.) 418. Compare *Lake v. Cook*, 15 Ill. 353.

³ *Keighler v. Savage Manuf. Co.*, 12 Md. 388. See also *Baird v. Rice*, 1 Call (Va.), 118.

BY ONE PARTNER IN FIRM. — Equity will not set aside an execution issued in favor of the defendants, against a firm, against whom the orators had a claim and subsequent attachment, on the ground that the defendant's writ was made returnable to a wrong term of the court, and because the execution was taken out against all the members of the firm upon a judgment confessed by one only. *Shedd v. Bank of Brattleboro*, 32 Vt. 709. But when, after the judgment, similar statements were made by the parties holding judgment against an endorser, and the latter was induced thereby to believe that he was not liable, and to abstain from securing himself when he might have done so, until the maker became insolvent, — *held*, that he was entitled to an injunction restraining such parties from enforcing the execution levied under such judgment. *Roberts v. Miles*, 12 Mich. 297.

II. ILLUSTRATIONS OF THE JURISDICTION.

A. DIRECT RELIEF AGAINST JUDGMENT

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| <p>§ 126. Relief on Ground of Fraud.
 127. Same — Violation of Agreements.
 128. Same — Assurances from Opposite Party.
 129. Party must have been misled without Negligence on his own Part.
 130. Fraud must relate to Procurement of Judgment and affect Parties thereto.
 131. Relief on Ground of Accident.
 132. Relief on Ground of Mistake.
 133. Mistake of Law.
 134. Relief on Ground of Surprise.
 135. Ignorance — Newly Discovered Evidence.
 136. Same — Restrictions and Requirements.
 137. Equitable Defence not available at Law.
 138. Relief against Void Judgments — Authorities in Conflict.
 139. Same — No Notice to Defendant.
 140. Same — Non-residence; Service by Publication.
 141. Same — No Jurisdiction of Subject-matter; Amount.
 142. Same — Judgment in Justice's Court.
 143. Interlocutory Judgment without Notice.</p> | <p>§ 144. Judgment paid in Whole or in Part.
 145. Same — Release; Remittance of Fine.
 146. Same — Principles and Sureties.
 147. Same — What constitutes Release or Payment.
 148. Judgment for Purchase-money — Failure of Title.
 149. Same — Personalty.
 150. Judgments against Party not of Legal Capacity.
 151. Unauthorized Appearance of Attorney.
 152. Execution after New Trial granted.
 153. Set-off and Counter-claim against Judgment.
 154. Same — Matters of Offset which are available.
 155. Same — Judgment assigned; Non-residence of Plaintiff.
 156. In Favor of Surety or Indorser on Account of Release of Principal.
 157. In Favor of Owner of Cause of Action not a Party.
 158. Conflicting Claims.
 159. Judgments founded upon Usury.
 160. Same — On Gaming and other Void Contracts.
 161. In Favor of Garnishee.</p> |
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§ 126. Relief on Ground of Fraud. — Fraud is one of the broadest grounds of equity recognized by courts, and relief may be obtained against a judgment at law although the party might find a remedy in a court of law.¹ And even if the party had

¹ Nelson v. Rockwell, 14 Ill. 375. See also Devoll v. Scales, 49 Me. 320; Wingate v. Haywood, 40 N. H. 437; Cage v. Cassidy, 23 How. (U. S.) 109; Southern Exp. Co. v. Craft, 43 Miss. 508; Seymour v. Miller, 32 Conn. 402; Starr v. Heckart, 32 Md. 267; Cooper v. Tyler, 46 Ill. 462; Givens v. Campbell, 20 Ia. 79; Carson v. Combe, 86 F. 202; 29 C. C. A. 660. Compare Tomkins v. Tomkins, 3 Stockt. (N. J.) 512; Norris v. Campbell, 27 Md. 688; Daveiss v. M'Kee, 1 Bibb (Ky.), 331. A court of equity has the same power in the case of a judgment, founded on the statute, which arises from the forfeiture of a forthcoming bond. Nunn v. Matlock, 17 Ark. 512. In an action by the receiver of an insolvent corporation to set aside judgments against it upon the ground that they were fraudulently obtained

notice of the judgment in time to appeal, and made an abortive attempt to do so, this does not prevent him from applying to a court of equity for relief. And a court of equity will grant relief against void as well as voidable judgments.¹ In such proceeding, the province of equity is to test the conscience of the parties, not the legality of the judgment, nor to correct the errors of the court of law.² A perpetual injunction may be granted to stay proceedings on a judgment at law, obtained in a suit brought in the name of a person not interested, for the purpose of preventing a defence which the defendant had against the real plaintiff.³ So a court of equity will restrain by injunction the execution of a judgment at law obtained on a note, where the judgment plaintiff is an indorsee for collection only, and the maker has entered into no satisfactory arrangement with the real owner of the note for its payment, although the suit on the note has been assigned, where it is not shown that the assignee became such, without notice and for a valuable consideration.⁴

It is not necessary that the defendant shall have been misled

on fictitious claims, a preliminary injunction restraining defendants from interfering with the proceeds of the execution sales will not be disturbed where a month after the last advance alleged to have been made by the judgment creditor, and four months after the first advance, no entry appeared on the books of the corporation disclosing any such loans. *Pierce v. Mayer*, 13 N. Y. S. 343. Fraud in depriving defendant of opportunity to show right to pay debt in depreciated notes alleged. Injunction refused but held error. *Davis v. Tileston*, 6 How. 114. Fraud upon executor by distributees in joining in suit in which decree was obtained by taking advantage of mistake in inventory. Perpetual injunction granted against decree. *Fairley v. Thompson*, 34 Miss. 101. A court of chancery will exercise jurisdiction to perpetually enjoin the enforcement of the judgment obtained by one as surety of a firm, under the act of 1809, ch. 69, where it appears that the person obtaining such judgment was no surety. *Isler v. Turner*, 7 Humph. (Tenn.) 116. An attempt to revive by a *sci. fa.* a dormant judgment which was obtained during the sickness of the defendant and in the absence of his attorney, upon an unauthorized confession of the judgment of an inexperienced attorney, the note sued being outlawed by the statute of limitations, which had been duly pleaded, is properly restrained by injunction until the complainant can establish the facts alleged in his bill. In such case either the judgment should be decreed satisfied, or the suit to revive it perpetually enjoined. *Cheek v. Taylor*, 22 Ga. 127.

¹ *Nelson v. Rockwell*, 14 Ill. 375.

² *Clapp v. Ely*, 10 N. J. Eq. (2 Stock.) 178.

³ *Greenleaf v. Moher*, 2 Wash. 44, 393.

⁴ *Perry v. Siter*, 37 Mo. 273.

by overt acts or direct misrepresentation, and thereby prevented from effectually making his defence on the trial. It constitutes sufficient fraud to justify a court of equity in restraining enforcement of the judgment where it is obtained in violation of a stipulation entered into by the parties.¹

§ 127. **Same — Violation of Agreement.** — An injunction will not issue to enjoin the collection of a judgment obtained in violation of a verbal agreement between the parties if the rules of court require such agreement to be in writing,² nor in the absence of any other essential element of a valid contract.³ But, in the absence of such rules, if the plaintiff take judgment in violation of an oral agreement,⁴ or it seems, contrary to an implied promise⁵ not to do so, the party against whom such judgment is rendered will be entitled to have it enjoined for fraud. The granting of relief in such case is peculiarly proper where it appears that no new trial can be had, that the amount in controversy is such that no appeal can be taken, and that there is a valid defence to the action.⁶

§ 128. **Same — Assurances from Opposite Party.** — Where the defendant had been induced to allow a case to proceed to judgment upon plaintiff's assurances that he did not intend to enforce its collection against him, but against the payee, and judgment was accordingly rendered by default, it was held that an injunction should be granted perpetually restraining the collection of the judgment from the maker of the note.⁷ In another case the collection of a justice's judgment was restrained

¹ *McLeran v. McNamara*, 55 Cal. 508; *Greenwalt v. May*, (Ind.) 27 N. E. 158. Where a defendant, relying on the written guaranty of the plaintiff's attorney, that he would not take judgment against him or hold him in any way responsible, made no defence, — *held*, that the trial court should not vacate the judgment recovered by the plaintiff against said defendant, but should stay proceedings to allow the defendant to file a bill in equity to enjoin the plaintiff from enforcing his judgment. *Purviance v. Edwards*, 17 Fla. 140.

² *Collier v. Falk*, 66 Ala. 223; *Harman v. Harman*, (C. C. A.) 70 F. 894; 17 C. C. A. 479.

³ See *Heim v. Butin*, 42 P. 138; 109 Cal. 500, where no consideration for the agreement was shown.

⁴ *Gillett v. Booth*, 6 Ill. App. 423; *Moore v. Lipscombe*, 82 Va. 546. See also *Porter v. Moffett*, 1 Morr. (Iowa) 108.

⁵ *Jarman v. Saunders*, 64 N. C. 367; *Atkinson v. Cox*, Id. 576; *Rowland v. Thompson*, Id. 714.

⁶ *Gulf, C. & S. F. Ry. Co. v. King*, 80 Tex. 681; 16 S. W. 641.

⁷ *Baker v. Redd*, 44 Iowa, 179.

because of a fraudulent representation to the defendant, that the purpose of the action was merely to collect of him an unpaid note, when in fact another note was intentionally included.¹ Equity will relieve against a judgment obtained by inducing defendants to withdraw an equitable plea filed in the case, by a promise of plaintiff, that, if such plea were withdrawn, he would do the equity set up in the plea, all of which he has failed to do.²

§ 129. **Party must have been misled without Negligence on his own Part.** — While it is not always necessary that the false representations by which the complainant was prevented from making his defence should have been made by the opposite party, yet relief will not be granted to one who has acted upon the mere assurances and opinions of others not parties; for instance, that the case would not be reached and tried at the time or at the term when set. This rule was applied where a married woman, party defendant in a foreclosure suit, was assured by her husband that the matter was arranged and the mortgage discharged.³ Nor will equity relieve against a judgment at law obtained by fraud, where the party invoking its aid has slumbered on his rights since discovering the fraud. The court will apply this rule according to the special circumstances of each case presented.⁴ Relief in equity will not be given against a suit at law, on the grounds of fraud, unless the fraud is made a distinct allegation in the bill, so that it may be put in issue by the pleadings.⁵ But such bill need not aver that the judgment plaintiff is insolvent.⁶

¹ *Hinckley v. Miles*, 15 Hun (N. Y.), 170.

² *Markham v. Angier*, 57 Ga. 43. But see *Higgins v. Bullock*, 73 Ill. 205. What facts will justify an injunction against proceedings on a judgment where it is alleged that the defendant was fraudulently induced by the plaintiff not to set up a certain plea, — considered. *Harris v. Western & Atlantic R. R. Co.*, 59 Ga. 830.

³ *Dozier v. Wilkinson*, 76 Ga. 835. The validity of a decree cannot be objected to on the ground of misrepresentations made to appellant by counsel for the respondent, and of such counsel's appearance for respondent after a receipt of a general retainer from the appellant, where it appears by the record that the appellant has not been misled or prejudiced thereby. *Humphrey v. Darlington*, 15 Iowa, 207.

⁴ *Brown v. Buena Vista County*, 95 U. S. 157.

⁵ *Patton v. Taylor*, 7 How. 132. As to effect of denials of the allegations

⁶ *Smith v. Schwed*, 2 McCrary C. Ct. 441.

Where a party seeks to impeach a judgment and enjoin its collection on the ground of fraud, the burden of proof rests upon him to establish it.¹

§ 130. **Fraud must relate to Procurement of Judgment and affect Parties thereto.** — The fraud which will authorize a court of equity to vacate or enjoin a judgment must be fraud in the procurement of the judgment.² An injunction will not be granted to stay proceedings upon a judgment, upon the ground of fraud in contracting the debt; such matter ought to be pleaded in defence to the action.³ A bill in equity for an injunction to restrain a judgment obtained against the complainant, on a note executed by him as surety, charging that the principal induced him to sign the note by fraudulent misrepresentations as to the purpose for which the note was given, and as to the complainant's liability on account thereof, but not charging or proving fraud or misrepresentation by the party to whom the note was executed, was held to state no sufficient case for relief.⁴ Nor will a court of equity interfere at the suit of one of the defendants in a judgment at law, to compel the plaintiff to collect his judgment out of another defendant, who, by agreement with his co-defendant, had bound himself to pay it.⁵ So an allegation in a bill that a judgment was rendered against complainant in proceedings under a landlord and tenant act,

in the complaint and the discretion of the court where defendant denies all the allegations of the complaint, see *Bentley v. Crenshaw*, (Ga.) 11 S. E. 650. Bill to enjoin proceedings, under a judgment by default, on a replevin bond, on the ground that additional evidence of fraud had been obtained, failed to show when this was obtained. *Held*, that the injunction ought not to have been granted. *Hannon v. Maxwell*, 31 N. J. Eq. 318.

¹ *Daly v. Ogden*, 28 Ill. App. 319.

² *Payne v. O'Shea*, 84 Mo. 129; *Whitaker v. Wickersham*, 5 Del. Ch. 187; *Redwin v. Brown*, 10 Ga. 311. Compare *Monroe v. Delavan*, 26 Barb. (N. Y.) 16.

³ *Muscatine v. Mississippi, &c. R. R. Co.*, 1 Dill. 536. A judgment at law, recovered for the consideration of property sold will not be enjoined because the contract of sale has been declared void, such defence not having been taken at law, nor because the plaintiff apprehends a failure of title, he having long been, and still being, in possession. *Truly v. Wanzer*, 5 How. 141. That a note had been obtained by fraud in the *factum* is a good defence at law, and cannot afterwards be brought forward for the purpose of an injunction to restrain the issue of an execution therein. *Purtin v. Luterloh*, 6 Jones (N. C.) Eq. 341.

⁴ *Griffith v. Reynolds*, 4 Grat. (Va.) 46.

⁵ *Skinner v. Barney*, 19 Ala. 698.

ousting complainant from certain premises at the suit of one who was not the landlord, which judgment was procured by fraudulently substituting such premises in the proceedings in place of those which were really the subject of a lease between the parties many years before, is insufficient to warrant an injunction against the enforcement of the judgment, as it is not shown that complainant was prevented from making this defence by the fraud of the other party, or by accident or mistake of complainant, unconnected with negligence.¹

§ 131. **Relief on Ground of Accident.** — Accident to a party — by which is meant some unforeseen event, which he could not by due diligence have provided against — will, when unconnected with any laches in providing against or avoiding its consequences, entitle him to relief by injunction against a judgment which but for such accident the plaintiff in the action would not have been entitled to, provided that there remain no legal remedies for setting aside default, and reinstating the cause. Sickness of a defendant, or sickness in his family, is one of the commonest instances of accident upon which to base an application for relief in equity. A party failing, because of sickness, to file his defence in an action at law, is entitled to relief in a court of equity.² But in order to obtain relief on this ground, complainant must show that he has been guilty of no laches; and showing that he was unable to be present at the trial, on account of the sickness of his family, is no ground for relief in equity unless he also shows that his presence was necessary to make a defence.³ Where the cause alleged was the sickness of the defendant and his witness at the time of the trial, but the name of such witness was not disclosed, nor the facts constituting the defence set out, and it was not alleged that the witness could have proved facts constituting a defence, or that the complainant could not have applied for a new trial at law, it was held that the bill did not show grounds for interference by reason of accident.⁴ It is not a sufficient excuse for not making a defence at law, so as to give chancery jurisdiction, that a creek, which had to be crossed to get to the court-

¹ *Brick v. Burr*, 47 N. J. Eq. 189; 19 A. 842.

² *Clifton v. Livor*, 24 Ga. 91.

³ *Jamison v. May*, 13 Ark. 600.

⁴ *French v. Garner*, 7 Port. (Ala.) 549.

house, was so swollen by the rains, on the first day of the court, that it could not be crossed, and so continued for three days, it not being shown on what day the court adjourned, or when the judgment was rendered, and no effort having been made to get to the court-house after the flood subsided.¹ But it was held proper ground for relief against a judgment on a note against the maker that a written contract without which the maker could not make his defence at law, had been lost.² And the loss of the defeasance to a bond was held good reason for the interference of a court of equity though no defence was made at law.³

§ 132. **Relief on Ground of Mistake.** — Where a judgment has been obtained against a party by surprise, or through mistake of the court, without laches on his part, and where manifest injustice must result from it, if allowed to stand, he may maintain a suit in equity to have it set aside or enjoined, after the adjournment of the term at which it was entered has deprived him of his remedy by motion.⁴

Mistake which will entitle a party to relief against a judgment at law must have been mistake in some matter of fact not attributable either to laches of himself or to want of attention or lack of skill on the part of his counsel. It is but a proper application of this principle for equity to refuse relief against a judgment or other proceeding at law when the application is based upon a mistake in pleading or in the conduct of the cause.⁵ It is no objection to relief in equity against a judgment obtained through mistake for twice as much as it ought to have been, that the complainant's land, which was taken and sold on execution

¹ *English v. Savage*, 14 Ala. 342.

² *Vathir v. Zane*, 6 Grat. (Va.) 246.

³ *Wilson v. Davies*, A. K. Marsh. (Ky.) 219.

⁴ *Bibend v. Kreutz*, 20 Cal. 109. A judgment of condemnation was rendered by mistake upon an attachment that had been issued upon a justice's judgment after the time when an attachment could have been lawfully issued. *Held*, that the judgment should be enjoined. *Weikil v. Cate*, 58 Md. 105. But after the dissolution of one injunction another was granted to the same judgment, and made perpetual, it appearing that the contract in question, though not tainted with fraud, was founded in a mistake of both parties in relation to the existence of a fact of which both parties were ignorant, and which was not known to the complainant until after the first injunction was dissolved. *Armstrong v. Hickman*, 6 Munf. (Va.) 287.

⁵ *George v. Strange*, 10 Grat. 499; *Jamison v. May*, 8 English, 600; *State Bank v. Stanton*, 2 Gilm. 352.

to satisfy the judgment, was previously conveyed by the complainant to his own children with a fraudulent intention to evade the payment of the judgment.¹ But where it is sought to enjoin the enforcement of a common-law judgment on the ground that the complainant was prevented from making his defence to the suit in which the sale was rendered, by mistake, oversight, etc., due diligence must be shown, and the facts set forth demonstrating how such omission occurred.²

Mere mistakes, in a bill of exceptions, constitute no ground for enjoining in chancery from the prosecution of a writ of error.³ But if a meritorious bill of exceptions be dismissed because of a mistake made by the certifying judge, and without the fault of the counsel, equity will restrain the enforcement of the judgment thus affirmed, until the matters set up in the dismissed bill of exceptions can be heard.⁴

§ 133. **Mistake of Law.** — It is only in rare and exceptional cases that a mistake of law will entitle a party to equitable relief by injunction. The general and well-nigh universal rule is that it is no ground for relief in equity against a judgment, that the party was prevented from making his defence at law, by a mistake of law. And it was held not to create an exception where it was a mutual mistake of both parties to the suit.⁵ But relief was granted in a case in Texas under peculiar circumstances. At a certain time the ordinary method of removing a case from a justice's court was by *certiorari*, grantable by a judge, to be

¹ *Williamson v. Johnson*, 5 N. J. Eq. (1 Halst.) 318.

² *Simmons v. Martin*, 58 Ga. 620. See also *Falls v. Robinson*, 5 Md. 365.

MISTAKE IN DESCRIPTION. — An application was made to enjoin the proceedings under a levy and sale where a portion of the lot of land in controversy was described correctly as to the number, the portion of the lot from which it was taken, and the boundaries, but there was a mistake as to the district. *Held*, that, as that mistake did not avoid the levy, and that, notwithstanding its existence, the land might be readily identified, the injunction should not issue. *Bogges v. Lowery*, 78 Ga. 539; 3 S. E. 771.

MISTAKE OF COURT. — A bill filed by a defendant in ejectment, setting forth a history of the trial, and alleging that the supreme court had, in its judgment of affirmance, made a mistake as to certain material facts in the record, and praying a perpetual injunction against the plaintiff in the ejectment cause, was held properly dismissed on demurrer; the mistake of fact could have had no effect on the judgment. *Russel v. Staton*, 38 Ga. 195.

³ *Ford v. Weir*, 24 Miss. 563.

⁴ *Kohn v. Lovett*, 43 Ga. 179.

⁵ *Richmond, etc. R. R. Co. v. Shippen*, 2 Patt. & H. (Va.) 327.

applied for within ninety days after judgment. An act was passed authorizing the clerks of the district courts to issue writs of *certiorari*, and a party obtained one from the clerk. This law was decided to be unconstitutional. It was held that the mistake of the law was sufficient excuse for not having obtained a *certiorari* in due time from the district judge, and that the party on a showing of merits was entitled to the interposition of equity by injunction.¹

§ 134. **Relief on Ground of Surprise.** — Relieving against surprise is one of the original heads of equity jurisdiction; and where a judgment has been obtained against a party by surprise, in a matter which he could not by reasonable diligence have foreseen, in time to have made his defence to the action, and his claim to relief is otherwise meritorious, the judgment so obtained will be enjoined until he is given an opportunity to make defence.² Where, without negligence on his part or on

¹ Cobbs v. Coleman, 14 Tex. 594.

² Philip v. Samuel, 76 Mo. 657. See also Forrester v. Wilson, 1 Duer (N. Y.), 624. To nearly same effect, Agron v. Baum, 7 Robt. (N. Y.) 340; Griffith v. Brown, 28 How. (N. Y.) Pr. 4. Compare Peters v. League, 13 Md. 58. H. sued R. for services as an attorney, and called as a witness S., who had also become liable for the same services. Just before S. paid H. the full amount due; R. did not know of the payment, and had no means of knowing it until after the judgment was rendered against him. Held, that H. would be enjoined from collecting his judgment. Reed v. Harvey, 23 Ark. 44.

JUDGMENT PENDING ARBITRATION.— Where the parties submitted the matter in dispute to arbitration, after suit instituted, and the award was that the defendant pay a certain sum and the costs of the suit, and he performed the award by giving his note for the debt, with security, but failed to pay the costs, and the plaintiff proceeded to judgment for the whole debt, — this was held to be such a surprise as equity would relieve against; and, in such a case, the defendant is not guilty of negligence in failing to appear and plead to the action. Sneed v. Town, 9 Ark. 535.

NEW COUNTS FILED AT TRIAL. — Where foreigners were sued in an action which gave them no notice of the particular claim, and new counts were filed at the trial, covering a claim not before embraced in the declaration, and no verdict was given for the plaintiffs which they could not have obtained on facts which the defendants would have supplied on having notice, — held, to be a case of surprise, and that an injunction should issue as to so much of the verdict as was clearly wrong, and which would not have been given but for the surprise. Bell v. Cunningham, 1 Sumn. 89.

DECLINATION OF WITNESS ON GROUND OF INTEREST. — A. and B. being partners, A. made a loan, and took a note in the name of the firm, which was afterwards put in suit by B., who had no knowledge of surety in the note; and it appeared by the declaration that A. had parted with all his interest in the note. A., on being called by the defendant at the trial to prove the usury,

the part of his attorney, the latter being familiar with the rules and practice of the court in which his cause is pending, he is justified in believing that it will not be taken up during a certain month, and it is taken up and the trial proceeded with unexpectedly and in a manner not in accordance with the previous practice of the court, and of which no notice has been given, execution of the judgment thus obtained will be enjoined.¹ So if the defendant in an action at law on promises founded on gaming consideration is surprised at the trial, and there is a verdict and judgment against him, he may have relief in equity, though he made no effort to obtain a new trial in the common-law court.² But an injunction to stay the execution of a judgment obtained after a trial at law, will not be granted where there was no surprise but such as might have been reasonably anticipated.³ And a court of equity should not enjoin the enforcement of a judgment at law, upon ground of any accident or surprise for which the party might have obtained a continuance in the action at law, but did not ask it.⁴

On a suit to enjoin a judgment on the ground of surprise, the court may consider the merits of the original case.⁵

§ 135. **Ignorance — Newly discovered Evidence.** — The mere fact that a party has mistaken his rights, and so failed to make a defence which it was competent for him to make at law, does not entitle him to relief in chancery.⁶ But if a fact material to the merits should be discovered after a trial, which could not by ordinary diligence have been ascertained before, relief will be granted.⁷ And equity will relieve where the plaintiff had a

declined to testify, on the ground that he was still interested in the note. *Held*, that this was such a surprise as entitled the defendant to come into the court of chancery for relief against the verdict at law. *Post v. Boardman*, 1 Clark (N. Y.), 523.

¹ *Beveridge v. Hewitt*, 8 Ill. App. 467.

² *White v. Washington*, 5 Grat. (Va.) 645.

³ *Fowler v. Roe*, 11 N. J. Eq. (3 Stock.) 867.

⁴ *Crim v. Handley*, 94 U. S. (4 Otto) 652.

⁵ *Philip v. Samuel*, 76 Mo. 657.

⁶ *Dickerson v. Commissioners of Ripley County*, 6 Ind. 128.

⁷ *Cox v. Mobile, etc. Ry. Co.*, 44 Ala. 611; *Harvey v. Seashol*, 4 W. Va. 115. See *Sewell v. Freeston*, 1 Ch. Cas. 65; *Jarvis v. Chandler*, 1 Turn. & Russ. 819; *Iglehart v. Lee*, 4 Md. Ch. Dec. 514; *Gainsborough v. Gifford*, 2 P. Will. 424, where defendant after judgment found a receipt under plaintiff's own hand for the very money in question. But the authority of this case was doubted by Lord Eldon in *Protheroe v. Forman*, 2 Swanst. 282, 283, but has

good defence at law to a considerable part of the claim, but was ignorant thereof without laches, and there was a combination between the defendants to deprive him of an offset.¹ A bill to enjoin a judgment at law was held not without equity when it alleged and set out newly discovered evidence establishing the fact that, at the date of the trial at law, the judgment debtor was discharged from all liability; that he did not then have the means of proving that fact, and that, although he had used due diligence, he did not know, and had no opportunity of knowing, that such evidence existed.² Many instances of relief granted on this ground might be cited. Thus after a verdict at law in an inferior court, which has no power to grant a new trial, chancery will grant relief on the ground of newly discovered evidence, where the sum in controversy is sufficiently large to bear the expenses.³ Relief was granted an administrator, partially on the ground that he was one of those persons who are obliged from nature of his office to rely upon the information of others.⁴ But this reason would seem scarcely tenable when it is considered that most litigants are under the necessity of relying to a great extent upon the advice of counsel.

The court will, in a proper case, grant relief against part of a judgment obtained by surprise, as where an excess was decreed, because of facts in the complainant's knowledge and not in the defendant's.⁵

since been recognized, either expressly or with qualifications, in other cases. See *Williams v. Lee*, 3 Atk. 224; *Hennell v. Kelland*, 1 Eq. Abridg. 377, pl. 2; *Smith v. Lowry*, 1 Johns. Ch. 320; *Hankey v. Vernon*, 2 Cox, 12; *Taylor v. Shepherd*, 1 Younge & Coll. 277, 279, 280; *Baronne v. Brent*, 1 Vern. 170; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 336, 337.

¹ *Davis v. Tileston*, 6 How. 114.

UNDISCOVERED COLLUSION. — Two parties acted in collusion to compel a double payment of a debt by suits apparently in separate rights. One party having been defrauded by acknowledgment of satisfaction by his confederate, brought suit against the debtor, to which suit the acknowledgment could have been pleaded in bar, had the defendant known the facts. Judgment was had against the debtor, who, upon becoming informed of the facts, sought the perpetual injunction of the collection of the judgment. *Held*, that he was entitled to this relief. *Roach v. Duckworth*, 61 How. (N. Y.) Pr. 128.

² *Cox v. Mobile, etc. R. R. Co.*, 44 Ala. 611.

³ *Floyd v. Jaynes*, 6 Johns. (N. Y.) Ch. 479.

⁴ *Hewlett v. Hewlett*, 4 Edw. (N. Y.) 7.

⁵ *Basye v. Beard*, 12 B. Mon. (Ky.) 581. In this case a bill in equity alleged that an important fact had been discovered since a former decree, without the negligence of the complainant; that by this fact the decree would be

§ 136. **Same — Restrictions and Requirements.** — Where the bill seeks discovery in addition to an injunction against the judgment, it is the ordinary course of the court of equity to restrain the execution, but allow the plaintiff to proceed to a judgment at law. And it is only upon an averment in the bill that the plaintiff in equity believes the answer will afford discovery material to his defence at law, that an injunction to stay the trial ought to be granted.¹ Owing to the fact that disqualification of parties by reason of interest has been generally removed, this rule is now of but little importance.

A court of equity will not interfere with the judgment, except for some new matter not known to the party while the court of law had the case in its power, and then, not for matter to repel the charge by opposing proofs, but such as destroy an adversary's proof.² Nor does the writ lie to enable a party to obtain corroborative evidence.³

In a bill to enjoin a judgment at law, on the ground of newly discovered evidence, showing payments which should have been taken into consideration on the trial, a statement, generally, that the complainant did not know that he could make such proof until after judgment and adjournment of the court, and that he used all diligence to get such proof, but did not succeed until after the trial, is insufficient. He should show what he has done, and what degree of diligence he has used,⁴ and these allegations must be supported by proof.⁵

changed, and prayed for general relief and for an injunction against part of the former decree. *Held*, that the bill should be considered as one of review, though the record of the former case was not made a part of it ; that on the prayer relief would be granted, as in a bill of review.

¹ *Williams v. Sadler*, 4 Jones (N. C.) Eq. 378.

² *Houston v. Smith*, 6 Ired. (N. C.) Eq. 264.

³ *Eden on Injunct.* ch. 3, pp. 10, 11; *Stephenson v. Wilson*, 2 Vern. 325; *Blackhall v. Combs*, 2 P. Will. 70; *Holworthy v. Mortlock*, 1 Cox, 141; *Kemp v. Mackrell*, 2 Ves. 579; *Stevens v. Praed*, 2 Ves. Jr. 519; *Ware v. Horwood*, 14 Ves. 31; *Lansing v. Eddy*, 1 Johns. Ch. 49; *Hankey v. Vernon*, 2 Cox, 12.

⁴ *Levan v. Patton*, 2 Heisk. (Tenn.) 108; *Slack v. Wood*, 9 Grat. (Va.) 40. See also *Taliaferro v. Branch Bank at Montgomery*, 23 Ala. 755. Not ground for relief that party had a good defence, but did not avail himself of it, because he misunderstood the nature of the action, and because those interested in the matter were out of the county. *State Bank v. Stanton*, 7 Ill.

⁵ *Meem v. Rucker*, 10 Grat. (Va.) 506.

§ 137. **Equitable Defence not available at Law.** — A court of equity has jurisdiction to set aside or annul a judgment obtained at law, where a proper state of facts is shown, and where at law the defence was inadmissible.¹ Thus a judgment against a party on a note signed in the name of the firm of which he had been a member will be enjoined, where the note was given by another member of the firm for his individual debt, contracted before the formation of the copartnership, and where this defence could not, by the exercise of ordinary diligence, be made at the trial.² So a judgment recovered before a justice for an unjust

(2 Gilm.) 352. Bill should show that defence at law was unknown to complainant at time of rendition of judgment. *Garrett v. Lynch*, 44 Ala. 683.

LEAVING RECEIPT WITH ATTORNEY. — A bill to restrain a judgment alleged that complainant had a receipt for the whole amount of the claim for which the judgment had been rendered; that he was prevented by sickness from attending the trial; that the damages were increased by the testimony of some unscrupulous witnesses who could have been discredited if complainant could have been present; and that new evidence had been discovered too late for a new trial. *Held*, that there was no ground for equity, as complainant should have left the receipt with his attorney, or the attorney should have asked for a postponement or petitioned for a new trial; and that, the judgment having been through his laches, newly discovered evidence was no ground for equitable relief. *Kersey v. Rash*, 3 Del. Ch. 321.

¹ *Lamb v. Anderson*, 1 Chand. (Wis.) 224; *Allen v. Pearce*, 6 Jones (N. C.) Eq. 309; *Lesley v. Shock*, 3 Houst. (Del.) 130. A note was indorsed and delivered upon a parol agreement that such a note should be security for money borrowed of the indorsee by the indorser. *Held*, that a court of equity would enforce such agreement, and enjoin an execution obtained at law by the indorsee. *Smith v. Coble*, Phill. (N. C.) Eq. 332.

CONDITIONAL RETAINER. — JUDGMENT AGAINST ATTORNEY. — Plaintiff and defendant, attorneys, agreed to defend a township in suits against it on its bonds, on condition that, if at any time the bonds were adjudged valid, the fee was to be refunded. A judgment was rendered declaring the bonds invalid, and plaintiff collected the fee, but refused to pay defendant any part of it. In a suit by the latter for his half of the fee, plaintiff set up his liability to return the money in case the bonds were held valid on appeal, which defence was disallowed and defendant obtained judgment. Afterwards the United States supreme court held the bonds valid. *Held*, that the enforcement of the judgment against plaintiff would be unconscionable, and he could enjoin its execution. *Bassett v. Henry*, 34 Mo. App. 548.

² *Baltzell v. Randolph*, 9 Fla. 366.

OMISSION FROM CONTRACT. — Where, in reducing to writing a contract for the sale of land and the crops thereon, the undertaking of the seller to put the purchaser in possession of the crops was omitted by mistake and he did not put the purchaser in possession of them (which were of the value of \$100, as estimated in the contract), but recovered judgment for the whole amount of the purchase-money against the purchaser, — *held*, that the latter was entitled to have the judgment enjoined to the extent of \$100. *Booth v. Kesler*, 6 Grat. (Va.) 350.

amount, after an executed agreement of settlement, relied upon by defendant, but invalid as an agreement because made on Sunday, will be enjoined in equity.¹ A suit in equity to enjoin the enforcement of such judgment, brought immediately after its rendition, cannot be defeated by the plea of the statute of limitations,² but the right to relief may be lost by complainant's laches in seeking it.³ And under a statute prohibiting an injunction to restrain the execution of a judgment unless defendant shall be equitably not bound to pay it, an injunction will not be granted to restrain the collection of a judgment rendered on a note to which technical defences might have been interposed, but which equitably should be paid.⁴

§ 138. **Relief against Void Judgments — Authorities in Conflict.** — Though there is some conflict in the authorities as to whether relief should be given against a void judgment, courts which hold relief in such cases improper usually proceed upon the grounds that adequate remedies exist at law to set them aside, and that a sale or dispossession under a void judgment conveys no title or right.⁵ But though this reasoning should be admitted

¹ *Blackesley v. Johnson*, 18 Wis. 580.

² *Franks v. Morris*, 9 W. Va. 664.

³ *Thompson v. Tilton*, 34 N. J. Eq. 306.

⁴ *Sprague v. Lux*, 12 Ill. App. 271.

⁵ In the following cases it was held that, in the absence of fraud or gross injustice, and irremediable injury, courts of equity will not entertain jurisdiction in restraint of judicial sales of real estate under execution against third parties having no title to the property sold. *Wilcox v. Walker*, 94 Mo. 88; 7 S. W. 115; *Mann v. Wallis*, 75 Tex. 611; *Freeman v. Elmendorf*, 8 Halst. (N. J.) 655; *Bach v. Goodrich*, 9 Rob. La. 391; *Coughron v. Swift*, 18 Ill. 414; *Swayze v. Hackettstown Nat. Bank*, 44 N. J. Eq. 9; 13 A. 670; *Shalley v. Spillman*, 19 Fla. 500; *Barnes v. Mayo*, Id. 542; *Budd v. Long*, 18 Fla. 288; *Bouldin v. Alexander*, 7 Mon. (Ky.) 425; *McCulloch v. Hollingsworth*, 27 Ind. 115; *Wilson v. Hiatt*, 4 S. Car. 369; *Watkins v. Logan*, 8 Mon. (Ky.) 21; *Downing v. Mason*, 43 Ala. 266; *Hall v. Davis*, 5 J. J. Marsh. (Ky.) 290; *Russell v. Interstate Lumber Co.*, (Mo.) 20 S. W. 26; *Carlin v. Hudson*, 12 Tex. 202; *Whitman v. Willis*, 51 Tex. 421; *Treadwell v. Payne*, 15 Cal. 496; *Sanchez v. Camaja*, 31 Cal. 170; *Gutierrez v. Pino*, 1 N. M. 392; *Tevis v. Ellis*, 25 Cal. 515. An injunction was held properly granted under substantially the same circumstances as in the foregoing cases, in *Knightstown Bank v. Deitch*, 83 Ind. 131; *Bishop v. Moorman*, 98 Ind. 1; s. c. 49 Am. Rep. 731; *England v. Lewis*, 25 Cal. 337; *Wilhelm v. Woodcock*, 2 Or. 518; 5 P. 202; *Key City, etc. Co. v. Munsell*, 19 Iowa, 305. In *Osborn v. Taylor*, 5 Paige (N. Y.), 515, a bill to restrain the defendant from selling the plaintiff's farm, on execution against a third person, contained allegations, from which it appeared that the land was not bound by the judgment. It was held that a preliminary injuno-

to be sound in the case of judgments whose invalidity is apparent upon inspection, it can certainly have no force where the matter rendering the judgment void or voidable is not so apparent.¹ The better doctrine, however, is that, even in the case of judgments which are palpably void, an injunction should be granted when necessary for the prevention of conflicting claims for possession and vexatious litigation. Where the jurisdiction to enjoin the void judgment is exercised, it will be extended to restrain judgment upon a bond given for the amount of the void judgment, the reason being that, as it was inequitable to allow the collection of the void judgment, it was equally so to allow the plaintiff to enforce payment of the latter judgment.² And a judgment obtained in violation of an existing injunction is void; and proceedings to collect such a judgment may be

tion would be granted; but that the commencement of the suit for an injunction, and filing of the suit, in the county where the land lay, were sufficient notice to the purchaser on execution to entitle the plaintiff to a decree, at the final hearing, that the sale on execution was void. See *infra*, §§ 197, 198.

¹ *Chambers v. King Wrought Iron Bridge Manufactory*, 16 Kan. 270; holding that such an action may be maintained against any person who attempts to put such judgment in force, and who has apparent authority for so doing. See also *Hooke v. Richeson*, 106 Ill. 392; *Harper v. Terry*, 16 La. An. 216; *Christie v. Hale*, 46 Ill. 117; *Norton v. Beaver*, 5 Ohio, 178; *Oakley v. Williamsburgh*, 6 Paige (N. Y.), 262; *Bank of U. S. v. Schultz*, 2 Ohio, 471; *Uhl v. May*, 5 Neb. 157; *Bennett v. McFadden*, 61 Ill. 384; *Key City, etc. Co. v. Munsell*, 19 Iowa, 805; *Pixley v. Huggins*, 15 Cal. 127; *Irwin v. Lewis*, 50 Miss. 863; *Hinckley v. Haines*, 69 Me. 76; *Pettitt v. Shepherd*, 5 Paige (N. Y.), 498. In *Montgomery v. McEwen*, 9 Minn. 103, and in *Armstrong v. Sandford*, 7 Minn. 49, a conclusion contrary to that above expressed was reached; but these cases were subsequently overruled in *Conkey v. Dike*, 17 Minn. 457. A sale of real estate upon a void precept issued on account of a street improvement may be enjoined. *Goring v. McTaggart*, 92 Ind. 200. In Texas, deemed the appropriate relief. *Glass v. Smith*, 66 Tex. 548; 2 S. W. 195.

LOUISIANA.— Under the laws of Louisiana an injunction will lie to restrain the enforcement of a judgment that is null and void because it was rendered in vacation or out of term time, and the injunction will continue pending the appeal from such judgment. *Hernandez v. James*, 23 La. An. 483. See *Harper v. Terry*, 16 La. An. 216. Where a party enjoins a seizure, upon the ground that the judgment under which it issued is null and void because it was rendered and signed at chambers, he should deny under oath that either he or his counsel consented to the submission of the case to the judge to be decreed at chambers, before he attempts to avail himself of the omission of the clerk to enter such submission upon the minutes of the court, or complains that it was not reduced to writing, and signed by the parties and their counsel. *Rust v. Faust*, 15 La. An. 477.

² *Weaver v. Poyer*, 79 Ill. 417.

enjoined.¹ So an execution issued on a judgment the record of which has been destroyed, there being no renewal by substitution, will be restrained by injunction.² An injunction was held properly granted to stay proceedings upon a judgment in replevin, when it was for a sum three times the sworn value of the property replevied, and the award for detention was nearly twice such sworn value.³

One who is about to sue on a judgment which is void for want of proper service is entitled to a decree enjoining the judgment debtor from setting up its invalidity, when it appears that the latter, while obtaining a discharge in bankruptcy, secured substantial benefits by contending that the judgment was valid, and would not be bound by his discharge.⁴

A debtor who seeks an injunction against a judgment void *in toto* is not obliged to bring money into court before he can claim its interposition.⁵

§ 139. **Same — No Notice to Defendant.** — The limit to which the cases have gone in denying to a complainant relief, because of a prior adjudication in a court of law, extends no further than

¹ *Infra*, §§ 197, 198.

² *Cyrus v. Hicks*, 20 Tex. 483.

³ *Reno v. Teagarden*, 25 Iowa, 144.

VOID JUDGMENT OF JUSTICE. — Where the defendant agreed that the justice should render a conditional judgment against him, and the justice entered an absolute judgment by confession,—*held*, that a court of chancery had jurisdiction to relieve against the judgment. *Gwinn v. Newton*, 8 Humph. (Tenn.) 710. A court of chancery will enjoin a judgment rendered by a justice incompetent to sit, by reason of consanguinity, etc., unless the parties have waived the same in writing. *Smith v. Pearce*, 6 Baxter (Tenn.), 72. But where in claim and delivery proceedings before a justice of the peace the property was delivered to plaintiff, but afterwards the justice dismissed the proceeding for want of jurisdiction, and gave judgment of restitution against plaintiff, with an alternative judgment for \$150, it was held, that it was proper for the superior court to refuse a preliminary injunction to restrain the collection of an execution issued on the alternative judgment, on the ground that the property belonged to plaintiff, and if he paid the money he would be unable to recover it. *Powell v. Allen*, 103 N. C. 46; 9 S. E. 138.

⁴ *Wakelee v. Davis*, 44 F. 532; *Cornwall v. Same*, Id. 533. When an execution on a judgment or decree against an administrator, to be levied *de bonis intestatis*, has been returned "no property found," and the estate is afterwards declared insolvent, a court of equity will enjoin an execution against him personally, issued after the declaration of insolvency, although he may also have it superseded. *Lambert v. Mallett*, 50 Ala. 73; *Balkum v. Harper*, Id. 429.

⁵ *Edrington v. Allsbrooks*, 21 Tex. 186.

to cases where he has had a trial, or an opportunity for a trial, in which he might have availed himself of his equities.¹ A court of equity will perpetually enjoin the collection of a judgment at law where it appears that the defendant was not served with process, and that he had a valid defence to the action, although the judgment might also be reversed on error, on account of the failure of the record to show the service of process.² But where a party had actual notice, though not actually served, he must show very clearly that he has a meritorious case before a court of equity will interfere. Thus, where a copy of a writ served on the defendant by mistake named the wrong month in giving date of return, and the defendant purposely refrained from appearing, in order to take advantage of the mistake, it was held, that he had no standing in equity to restrain the collection of a judgment obtained on default by the plaintiff, who was ignorant of the mistake.³ The same rule applies where the claim to relief is based upon purely technical grounds, as where it appears that the rendition of the decree was suspended, by

¹ *Wistar v. McManes*, 45 Pa. St. 818.

² *Robinson v. Reid*, 50 Ala. 69; *Southern Ex. Co. v. Craft*, 48 Miss. 508; *Gerrish v. Hunt*, 66 Iowa, 682; *Ryan v. Boyd*, 33 Ark. 778; *Stubbs v. Leavitt*, 80 Ala. 352. See *Kelly v. Wiard*, 49 Conn. 443. Compare *Owens v. Ranstead*, 22 Ill. 161; *Ridgeway v. Bank of Tennessee*, 11 Humph. (Tenn.) 523. Relief against decree in chancery. *Williamson v. Russell*, 18 W. Va. 612. Where a general return of "executed" is made on a sheriff's writ, and it appears that the service was, by copy, left at the residence of defendant, in his absence, of which he did not receive notice in time to defend at law; if judgment is against him, equity will grant a new trial. *Lapiere v. Hughes*, 24 Miss. 69. One having an interest in real estate, who is not made a party to an action to foreclose a mechanic's lien thereon, may resist the enforcement of the decree by injunction on the ground that the action was barred by the statute of limitation. *Gates v. Ballou*, 56 Iowa, 741.

In New York and Tennessee it is held that equity will not restrain the enforcement of a judgment on the ground that process was not served. The remedy at law is adequate. The judgment would be set aside on motion. *Fullan v. Hooper*, 66 How. (N. Y.) Pr. 75; *Palmer v. Malone*, 1 Heisk. (Tenn.) 549. Nor will a court of equity restrain the enforcement of a judgment on the ground that defendant was never served with process, where the record shows no flaw or defect in the service, and where defendant does not state any facts imparting to the case some feature of equitable cognizance, such as fraud, accident, or mistake; defendant having a plain, speedy, and adequate remedy by a motion to vacate the judgment in the court and in the action wherein it was rendered. *Crocker v. Allen*, 34 S. C. 452; 13 S. E. 650.

³ *Gallup v. Manning*, 48 Conn. 25. Evidence on which it was held that service must be considered good and such as to preclude relief from the judgment. *Windwert v. Allen*, 13 Md. 196.

consent, until the opinion of the supreme court, in another case between the same parties, could be had, and that said decree was not rendered until after said opinion had been obtained.¹ Nor in any case will relief be granted where, notwithstanding the lack or defect of service, the party has appeared and pleaded.²

§ 140. **Same — Non-residence ; Service by Publication.** — A judgment will be enjoined in favor of a non-resident against whom a personal judgment has been rendered without notice to him, the officer's return of service which stated facts not within the officer's personal knowledge being impeached.³

An order of publication must be proved, in order to bring the respondent regularly before the court; and where this is not done, and a *pro confesso* taken, a decree perpetually enjoining a judgment at law will not be reversed.⁴

Under a statute providing that actions of ejectment "shall be brought against the person in possession of the premises claimed," declaring that a plaintiff, in order to recover in ejectment, must "show that at the time of the commencement of the action the defendant was in the possession of the premises claimed," a court of equity will restrain the execution of a writ of *habere facias possessionem* issued in pursuance of a judgment in ejectment rendered by default against a non-resident owner of lands served by publication, and whose tenant in actual possession of the lands was not served with process, upon the petition of the grantee of the non-resident owner, who bought the lands without notice of the action.⁵

§ 141. **Same — No Jurisdiction of Subject-Matter ; Amount.** — Where a judgment has been rendered in the district court upon a cause of action within the probate jurisdiction of the county court, the defendant should appeal; but if he does not, he can have execution enjoined, want of jurisdiction being a ground on which equity will interfere.⁶ But in a suit to enjoin the en-

¹ Stein v. Burden, 30 Ala. 270.

² Walker v. Robbins, 14 How. 584 ; Wilsey v. Maynard, 21 Iowa, 107 ; Albert v. March, 7 Pa. Co. Ct. Rep. 502. Where a judgment has been obtained against a principal and surety, it is no ground for the injunctive relief in favor of the surety, that the principal was not duly served with process, and had no opportunity to defend. Mason v. Miles, 63 N. C. 564.

³ McNeill v. Edie, 24 Kan. 108.

⁴ Moore v. Wright, 4 Stew. & P. (Ala.) 84.

⁵ Charter Oak Ins. Co. v. Cummings, 90 Mo. 267 ; 2 S. W. 397.

⁶ Cunningham v. Taylor, 20 Tex. 126.

forcement of a judgment, it will not be presumed that the amount involved was not within the jurisdiction of the court, where the declaration contained several counts, which together claimed a greater amount, though the judgment rendered was for less than the jurisdictional amount.¹

§ 142 **Same — Judgment in Justice's Court.** — The judgment of a justice of the peace in a case in which he had no jurisdiction, is a nullity, and may be perpetually enjoined.² An injunction will also be granted where the judgment of a justice of the peace is against a defendant sued and served with summons out of his county, and without an appearance.³ Where under the statute a final judgment against a garnishee cannot legally be rendered by a justice of the peace, if it is rendered, and an execution issued on it, the enforcement of the execution will be enjoined.⁴ So where the value of property seized under a *fi. fa.* from a parish court exceeds the amount to which its jurisdiction is limited, an injunction may be obtained, by one claiming to be the owner of the property, from a district court.⁵ And where at the time of the proceedings and judgment by default complainant was confined in an insane asylum in another part of the state, and neither he nor any one in his behalf had any notice of the suit, the judgment so obtained was perpetually enjoined, although a copy of the summons was left at complainant's place of residence.⁶

¹ Hill v. Gordon, 45 F. 276.

² McFaddin v. Spencer, 18 Tex. 440.

³ Grass v. Hess, 37 Ind. 193.

⁴ Missouri Pacific Ry. Co. v. Reid, 84 Kan. 410.

⁵ Stroud v. Humble, 1 La. An. 310.

⁶ Blakeslee v. Murphy, 44 Conn. 188. On appeal the appellate court held: 1. That the decree was not erroneous on the ground that there was adequate remedy at law by a writ of error, as the writ might not be so served as to operate as a *supersedeas*. 2. That parol evidence was admissible to prove that the petitioner had no notice of the pendency of the action against him, the proceeding not being a collateral impeachment of the judgment, but a direct proceeding to set aside. 3. That the general rules governing petitions for new trials and limiting the granting of them were not applicable, and that the petitioner, therefore, was not bound to show that he had a good defence against the action. 4. That by a perpetual injunction against the collection of the judgment, the respondent was not deprived of his cause of action by reason of its merger in the judgment, since, the judgment being void by reason of want of jurisdiction over the person of the petitioner, the original cause of action was not merged in it. A petition for an injunction against a justice's judgment, on the ground that he had no jurisdiction, and that the plaintiff had split his one cause of action into several, is fatally defective unless it alleges of what

§ 143. **Interlocutory Judgment without notice.** — On the same principle that final judgment entered against a party without notice will be enjoined in equity, relief will be granted against a judgment rendered upon a report of referees made prematurely and without notice; also where a reference already made is stricken out without defendant's knowledge.¹

§ 144. **Judgment paid in Whole or in Part.** — Injunction is the proper remedy to prevent the enforcement of a judgment which, or the foundation of which, has been satisfied or released in whole or in part.² Where a creditor, after suit, accepts money from the debtor in full settlement of his demand, the debtor may enjoin the enforcement of a judgment taken against him in his absence; and a complaint stating the payment, its acceptance in full settlement, and the entry of the judgment in the debtor's absence, sufficiently states the facts constituting the fraud by which the judgment was obtained.³ So, where a claim which had been sued upon was

the one, and of what the several accounts consisted. *Brundage v. Candle*, 25 Tex. 387.

¹ *Myers v. Daniels*, 6 Jones (N. C.) Eq. 1. In *Kincaid v. Conley*, Phill. (N. C.) Eq. 270, a bill in equity was filed in 1864, against executors, to obtain construction of a clause in a testator's will, but containing the necessary prayer for an account and settlement, and a reference in the Supreme Court of the State (to which the cause had been transferred) was ordered, and a report made at December term, 1864, without notice to defendant, and after the death of their counsel. Thereupon a decree was made against the defendants for the amount of their claims, which included a large sum of Confederate money. It was *held* to be a proper case for an injunction upon a bill in equity to restrain decree.

² *Heath v. Garrett*, 50 Tex. 264; *Whitehill v. Fauber*, 97 Ind. 169; *Sevier v. McWhorter*, 27 Mass. 442; *Dickinson v. McDermott*, 13 Tex. 248; *Bettison v. Jennings*, 8 Ark. 287; *Breeden v. Grigg*, 8 Baxter (Tenn.), 162. See also, *McClellan v. Crook*, 4 Md. Ch. 398, where payment was made while the cause was pending in the Court of Appeals. Where a defendant in a judgment in replevin tenders a return of the property within a time that is reasonable under all the circumstances, the defendant will be enjoined from enforcing by execution the alternative judgment for money. *McLellan v. Marshall*, 19 Iowa, 561.

³ *Gates v. Steele*, 58 Conn. 816; 20 A. 474.

INDORSEMENT FRAUDULENTLY OBTAINED. — A bill that alleged that complainant held a certain note, which, after payment, he was fraudulently induced to indorse; that the indorsee had recovered a judgment against the maker; that the indorsee was a non-resident and an insolvent; and dragged into litigation, — *held*, not to be demurrable, as complainant was entitled to relief by cancellation of the judgment or surrender of the note. *Hager v. Buechler*, 6 Ill. App. 462. After recovery of judgment on a note against the maker, E., and the indorser, F., and levy of execution under it on goods of E.,

settled before the term of court was begun, but the plaintiff wrongfully entered the action, took judgment and execution, and sometime afterward assigned the execution, it was held, that an injunction should be granted to relieve the execution debtor against its enforcement.¹ And an execution against real estate

E. gave a check, signed by his attorney, N., to the judgment creditor, and received from the creditor an assignment of the judgment; and the sheriff abandoned the levy, and returned the execution unsatisfied. Thereafter N. sought to collect it from F. In an action by F. to restrain such collection, there was evidence that the money paid for the assignment of the judgment was advanced by N. for the benefit of E.; that the property levied on was enough to satisfy the judgment; that the withdrawal of the levy was by authority of N.; and that F. was an accommodation indorser for E. of the note. *Held*, that the enforcement of the judgment against F. should be restrained. *Flagler v. Newcombe*, 13 N. Y. S. 299.

WHAT SUFFICIENT ALLEGATION OF PAYMENT. — An averment in a petition for such an injunction, that the judgment debtor had placed claims in the hands of the attorney of the judgment creditor, to be collected and applied on the execution, and that large sums had been collected on these claims, does not furnish grounds for an injunction. And the objection was well taken by demurrer. The facts alleged do not show payment. *Williams v. Bradbury*, 9 Tex. 487. But where the petitioner avers that an execution had been issued "for the payment of the judgment and costs," and that certain payments had been made thereon, but does not distinctly aver that they had been credited thereon, a general demurrer cannot be sustained. *Id.*

PRESUMPTION OF PAYMENT. — In Texas it is held that an injunction will issue against an execution issued after the expiration of a year from rendition of the judgment, because it is presumed from the delay in taking out execution that the judgment has been paid. But, if it appears that the judgment had in fact not been paid, the injunction will be dissolved, and any money which had come into the hands of the sheriff under the execution will be applied to the judgment under a proper prayer therefor on the part of the creditor. *Seymour v. Hill*, 67 Tex. 385; 3 S. W. 313.

¹ *Devoll v. Scales*, 49 Me. 320. See also, *Roach v. Duckworth*, 95 N. Y. 391. Where no ground is laid for an action of nullity, an injunction is allowable only for a payment alleged to have been made after judgment rendered. *Todd v. Paton*, 12 La. An. 88.

FRAUDULENT ASSIGNMENT BY AGENT. — An agent prosecuted a suit in favor of his principal to judgment, and indorsed upon the execution that a part of it was for his own benefit. Before the execution was placed in the hands of the sheriff, the defendant paid the whole amount to the principal and took his receipt in full discharge. *Held*, equity will enjoin all further proceedings on the execution. *Crawford v. Thurmond*, 3 Leigh (Va.), 85.

MISAPPLICATION OF TENDER BY CLERK. — When a judgment was recovered for a sum which, with costs, was less than the amount tendered, instead of for the sum tendered, as it should have been, and the defendant requested the clerk to apply the surplus of the tender after satisfying the judgments to the costs. *Held*, that an execution for costs should be enjoined. *Fisher v. Moore*, 19 Iowa, 84.

taken for public use will be stayed by injunction, inasmuch as the money awarded is substituted in such cases for the land.¹

A court of equity will relieve against the suing or levying of execution or other process upon a judgment which has been discharged by proceedings in bankruptcy.²

A bill against the United States for an injunction to restrain the enforcement of a judgment on the ground of payment, cannot be maintained, as the government is not liable to be sued, except with its consent; but the court, as a court of law, may, on motion, inquire as to the facts of payment, and order an entry of satisfaction.³ And where, after a mandate from the supreme court of the United States, ordering the circuit court to enter judgment for the plaintiff, the defendant moved the circuit court for leave to file a plea *puis darrein continuance* that he had paid the whole amount in question under process from the state court, but the court refused, on the ground that they could do nothing but carry out the mandate of the supreme court, it was held, that such defendant was entitled to an injunction to stay proceedings at law under the judgment of the circuit court.⁴

§ 145. **Same — Release ; Remittance of Fine.** — Where a judgment debtor paid a judgment creditor a part of the amount, and agreed to convey to him a certain lot of land, for which the creditor was to give him a release of the judgment, and it appeared that the debtor had no legal interest in the lot of land, it was held that he was not entitled to an injunction to stay proceedings for enforcing the judgment, except as to the amount which he had paid.⁵

Under a statute providing that no injunction shall be granted to stay a judgment except as to so much thereof as complainant may equitably show himself entitled to be relieved against, an injunction is the proper remedy to restrain execution for the county attorney's commissions on the judgment for a fine which was before the issue of the execution remitted by the governor.⁶

§ 146. **Same — Principals and Sureties.** — The jurisdiction has sometimes been invoked by sureties to secure the benefit of pay-

¹ Moore v. Barrett, 6 Phil. (Pa.) 204.

² Peatross v. McCaughlin, 6 Grat. (Vt.) 64.

³ United States v. McLemore, 4 How. 286.

⁴ Humphreys v. Leggett, 9 How. 297.

⁵ Gurley v. Hiteshue, 5 Gill (Md.), 217.

⁶ Smith v. State, (Tex.) 9 S. W. 274; Rev. St. Tex. art. 2874.

ments on liabilities and judgments thereon, against their principals and *vice versa*. Thus an injunction was granted in the circuit court of the United States, restraining judgment against a surety on a sheriff's bond, where pending proceedings in error the penalty of the bond had been collected from the surety by suit in the state court, and the operation of the mandate was such as to preclude a plea of the defence.¹ So where execution was issued on a judgment against principal and surety, and a part of the money was made by a levy on the estate and effects of the principal, but the execution was returned "no money made," and an alias issued against the surety for the whole amount of the judgment, it was held, the sheriff having absconded, that the surety was entitled to relief in equity, and that the court had jurisdiction to enjoin the execution for the amount made by the levy and sale.²

This form of relief is also sometimes successfully invoked in the settlement with their principals, of demands arising from recoveries against sureties. Thus judgments having been recovered against sureties by default, suit was afterwards commenced against the administrator of the principal, in which the defence of usury was successfully made, he accidentally discovering the evidence of it among the papers of the principal, and judgment therein was rendered for the sum loaned only, which he paid. It was held that this was a satisfaction of the judgments against the sureties only *pro tanto*, and that they could be relieved from the judgments on the ground of usury, only on paying the sum loaned and legal interest.³

§ 147. **Same — What constitutes Release or Payment. —** The

¹ *Humphreys v. Leggett*, 9 How. 297.

² *Fryer v. Anstell*, 2 Stew. (Ala.) 119. Suits by the heirs or distributees of an intestate against the sureties on the administrator's bond, will be enjoined, if it be impossible at law to find what portion the heirs had received already. *Fletcher v. Faust*, 22 Ga. 559.

³ *Jones v. Kilgore*, 2 Rich. (S. C.) Eq. 63. After an action had been brought against F. and T., sureties on the penal bond of D., the county commissioners, on F.'s paying \$250, released F. from all liability. Execution was issued against T., and the sheriff levied on T.'s personal property. *Held*, that T. could maintain a bill in equity to enjoin the threatened sale thereunder. *Trabing v. Albany County Commissioners*, 1 Wy. Ter. 301.

SEPARATE JUDGMENTS FOR TORT. — Where a separate judgment has been rendered against each of two joint wrong-doers, neither judgment can be perpetually enjoined, while both remain in force and unsatisfied, although one of the judgments has been assigned. *Meixell v. Kirkpatrick*, 25 Kan. 19.

principle applies, and relief will be granted, to the extent required by the circumstances, where a judgment has been paid or released in part only.¹ But where payment otherwise than in money is relied upon, it must be shown that the article delivered was accepted in part or entire satisfaction of the judgment; and in the absence of such showing the judgment creditor may prevent the granting of an injunction by delivering or tendering back the property or thing.² But if the judgment creditor, in his answer, admits the justness of credits claimed and states his willingness to allow them, they should be credited upon the execution.³ But where one ground upon which an injunction against a judgment was claimed to be supported, was, that the plaintiff in the suit enjoined had received payment of a large part of the debt, in consideration of which he had agreed to dismiss the suit at his own costs, and that he had not done so, but had taken judgment for the whole amount, it was held that it did not appear that he was seeking to enforce payment without giving the proper credits, and that if he was, the complainant was not entitled to enjoin the collection of the whole judgment because of the payment of a part.⁴ Therefore it is not sufficient to authorize a court of chancery to restrain an execution, to allege that a payment has been made on account of the debt, and not credited on the execution; it must

¹ *Thomas v. Brasher*, 4 T. B. Mon. (Ky.) 65. In this case A., having a judgment against B., agreed to receive from the trustee of B. the amount of the judgment, without interest, in satisfaction, and part was accordingly paid. A. afterwards took out execution for the whole amount. *Held*, on a bill by the trustee, that he might have the interest enjoined, or his obligation to pay the judgment cancelled.

² See *Newman v. Meek*, 1 Smed. & M. (Miss.) Ch. 331, where a judgment debtor delivered to the creditor a bill of exchange to be credited on the judgment when collected, and it was held, on a bill to enjoin the judgment, that the creditor must credit the bill upon the judgment, or deliver it back to the debtor.

³ *Webster v. Hardisty*, 28 Md. 592.

PAYMENT BY INDORSER. — Pending suit on a note, an accommodation indorser made payment thereon upon the agreement of the holder that he would take judgment for only the balance. The payments were not indorsed on the note, and the holder took judgment for the face of the note. *Held*, that he would be enjoined from collecting more than the balance. *Hentig v. Sweet*, 27 Kan. 172.

⁴ *Ellexander v. Baylor*, 20 Tex. 560.

In *Alabama* it is held that the defendant in a judgment has a full and complete remedy at law, by *supersedeas*, to obtain credit for a part payment of the judgment, and, consequently, such payment constitutes no ground for equitable relief. *Perrine v. Carlisle*, 19 Ala. 686.

be also charged that the plaintiff refused to make the credit, or that he is attempting to enforce payment a second time.¹

§ 148. **Judgment for Purchase-Money — Failure of Title.** — Where a purchaser of land has not obtained a title to the land, and judgment has been recovered against him at law for the purchase-money, he is entitled to relief in equity against the judgment.² It has been held necessary to show, in addition to the inability to make defence at law, that the holder of the note is insolvent;³ but the weight of authority is to the effect that, notwithstanding the ability of the vendor to respond in an action for damages upon his warranty of title, an injunction should be granted in such case to avoid circuitry of action and vexatious litigation. To entitle the vendee to relief in equity, however, he must allege and prove very clearly that the vendor undertook to convey a clear title free from incumbrances. And where one, who had only a life estate in land, made a deed for a fee simple, and the deed contained a warranty in fee, and the vendee, knowing of the defect in the title, gave his notes for the purchase-money, upon which judgments were obtained, it was held that a court of equity would not interfere by injunctive process to restrain the collection of any part of these judgments, but would leave the vendee to his action on the warranty.⁴ Where the testimony shows clearly that one party sold and the other understood that he was purchasing a pre-emption right, and that the party selling was not entitled to the pre-emption, the court will decree a perpetual injunction

¹ *Abercromb v. Knox*, 3 Ala. 728.

² *Cox v. Jerman*, 6 Ired. (N. C.) Eq. 526; *Vanscoy v. Stinchcomb*, 29 W. Va. 263; 11 S. E. 927. Two notes given for the purchase-money of two distinct tracts of land, but bearing date and executed on the same day, do not thereby necessarily become parts of the same transaction, nor so blended together that an eviction from one of the tracts will enable the vendee to enjoin the collection of the note given for the other. *Wray v. Furniss*, 27 Ala. 471.

³ *Wray v. Furniss*, 27 Ala. 471. See also *Henry v. Elliott*, 6 Jones (N. C.) Eq. 175; *Walton v. Bonham*, 24 Ala. 513.

⁴ *Henry v. Elliott*, 6 Jones (N. C.) Eq. 175.

INJUNCTION AGAINST ACTION ON COVENANT FOR TITLE. — A. sold land to B. with covenants of seizin, good right to convey, and general warranty, in 1839. In 1843, B. brought his action on the covenant of seizin against A.'s widow, having given her notice of a defect only a day or two before. The widow searched out the defect, and procured conveyances to herself, which perfected the title, and which she tendered B., but he declined them. B. recovered judgment for the purchase-money, with interest. A.'s widow brought her bill in equity to compel B. to accept the deeds and to enjoin his judgment. *Held*, that an injunction was proper. *Rees v. Smith*, 12 Mo. 344.

against a judgment obtained for the purchase-money.¹ An injunction will be granted against a judgment obtained by an assignee of a note, given for the purchase-money of land, the title to which has failed, where such assignee had previous notice of the defect or failure of title.² On the principle that a party seeking extraordinary relief by injunction must show that he will be prejudiced unless preventive relief be granted, however otherwise meritorious his claim, it is held that a vendee who enters under a title bond, and holds the land under that title until the statute of limitations bars a recovery against him by adverse title, cannot set up defect of title in his vendor existing at the date of the sale to him as ground for an injunction against a judgment for the purchase-money.³

A purchaser who shows no sufficient reason for not making his defence at law, and seeks equity for relief, must be governed by the general rule on this subject, to submit to take a title at the hearing, and complete his purchase.⁴

§ 149. **Same — Personalty.** — Though courts of equity are reluctant to wield their extraordinary powers for the protection of interests and rights connected with personal property, inclining to leave parties to whatever remedies the law affords, yet in cases of peculiar hardship and gross injustice relief by injunction will be granted. Thus, where an owner of personal property, incumbered by liens for more than its value, sold it, under a representation that it was unincumbered, and then obtained a judgment for the purchase-money, the collection of the judgment was enjoined until the incumbrances were removed.⁵ But where a bill alleged that the plaintiff and defendant had exchanged horses, and that the title to the horse which the plaintiff had received had failed, that the defendant was insolvent and was seeking to enforce execution against him on a judgment for the conversion of the horse which he had given in the exchange, and of which he afterwards had again obtained possession, it was held that the bill on its face showed no equity, and that an injunction should not have been granted.⁶

§ 150. **Judgment against Party not of Legal Capacity.** — The

¹ *Pelham v. Floyd*, 9 Ark. 530.

² *Black v. Bowman*, 9 Ark. 501.

³ *Amick v. Bowyer*, 3 W. Va. 7.

⁴ *McLaurin v. Parker*, 24 Miss. 509.

⁵ *Poe v. Decker*, 5 Ind. 150.

⁶ *Waldrop v. Green*, 63 N. C. 344.

rule, that such matters of defence as might have been pleaded on the merits cannot form legal grounds for an injunction in arrest of the execution of the judgment, finds an exception in cases of persons incapacitated from contracting generally or specially. As long as the disability lasts, a judgment obtained against them, under such circumstances, is liable to the same objection as the obnoxious obligation.¹

§ 151. **Unauthorized Appearance of Attorney.** — As has been stated, a party will be entitled to an injunction against the judgment where there has been no service of notice on him and his appearance was entered by an attorney who had no authority to appear, and who is unable to respond in an action for damages.² But a judgment by default will not be enjoined where no remedy obtainable at law has been sought, or because the party seeking the injunction was told or believed that no suit could be maintained against him until the determination of one pending, and that he need give himself no further trouble, and where it does not appear that any attorney was specially engaged to attend to the case, though one did in fact appear in it.³

§ 152. **Execution after New Trial granted.** — The granting unconditionally of a new trial in a cause as effectually vacates a judgment previously rendered therein, as if the judgment were set aside in express terms; and an injunction will not lie to prevent the collection of such judgment, because unnecessary.⁴

§ 153. **Set-off and Counter-claim against Judgment.** — Equity freely interferes by injunction to compel mutual adjustment of demands between judgment creditors and debtors, when the latter

¹ *Medart v. Fasnatch*, 15 La. An. 621. Though an appointment of a committee of an insane person be made without notice, and is therefore void, yet an injunction will not lie to restrain the exercise of powers under such appointment, as there is adequate remedy at law. *Lance v. McCoy*, 34 W. Va. 416; 12 S. E. 728.

² *Supra*, § 117. See also *Bunton v. Lyford*, 37 N. H. 512.

³ *Reed v. Hansard*, 37 Mo. 199.

APPEARANCE AND DEFENCE BY CO-DEFENDANT. — A bill to set aside a judgment, on the ground that service of process was not made upon the defendant, and that an appearance and plea were entered without his authority, was held to have been properly dismissed, where it appeared that the appearance and pleas were entered by the direction of a co-defendant, and there was a trial on the merits, and where no fraud was shown, and the bill did not allege that the attorneys appearing were irresponsible, nor show any defence to the suit at law. *Harris v. Gwin*, 18 Miss. (10 Smed. & M.) 563.

⁴ *Ricketts v. Hitchens*, 34 Ind. 348. See also, to same effect, *Marsh v. Prosser*, 64 Ind. 298.

are equitably entitled to set up a counter-demand, which, however, was not available by way of defence at law, or which has arisen since the judgment was rendered. Thus, a bill in equity will lie to enjoin a sale on an execution, obtained by a creditor of an heir and distributee, and levied upon what was claimed to be his interest in the estate of his father, who had died intestate, leaving real estate, but who, before his decease, had made an advancement to him exceeding what would have been his portion of his father's estate.¹ Especially will relief be granted in such case, when it is shown that the plaintiff in the judgment is insolvent and unable to respond in an action on the counter-demand,² though other circumstances may be sufficient without an allegation or proof of such insolvency.³ A judgment at law will not be enjoined to allow the defendant to set up payment or set-offs that might have been pleaded in the suit at law,⁴ notwithstanding the insolvency of the judgment creditor.⁵

¹ *Dyer v. Armstrong*, 5 Ind. 437.

² *McClennan v. Kinnaird*, 6 Grat. (Va.) 352; *McDonald v. Mackenzie*, (Or.) 14 P. 866; *Matson v. Oberne*, 25 Ill. App. 213; *Guttendag v. Lehigh Valley Iron Co.*, 14 Phila. (Pa.) 639.

INSOLVENT ADMINISTRATOR. — The administrator of an estate recovered a judgment against one of the distributees for \$3000. The distributee filed a bill to enjoin the sale of his property under said judgment, in which it was averred, that there were funds in the hands of the administrator coming to him, the distributee, amounting to \$5000; that the administrator had held possession of the estate for six or seven years, and was believed to be insolvent. It was held that the bill could not be dismissed upon demurrer, it not being necessary to aver that the securities to the administration bond were insolvent, but the injunction must be retained until a hearing thereon. *Carter v. McMichael*, 20 Ga. 96.

INSOLVENT EXECUTOR. — A complainant alleged in his bill that execution had issued against him in favor of the executors of a deceased testator; that such executors were indebted to him, as one of the legatees of the deceased, in a sum greater than that named in the execution; that the estate was free from debt; that the executors were insolvent. *Held*, that the chancellor erred in refusing the injunction and dismissing the bill. *Dobbs v. Prothro*, 57 Ga. 14.

³ *Jaynes v. Brock*, 10 Grat. (Va.) 211. In this case A., for himself and others, sold a part of a tract of land to B., who executed to A. his bond for the purchase-money. The other parties refused to confirm the contract, but sold their interests in the whole tract to B. A. recovered judgment upon the bond against B. *Held*, that B. might enjoin the judgment, and was entitled to relief to the extent of the damage he had sustained by A.'s failure to get a contract of sale confirmed. See also *Dickinson v. Chism*, 2 T. B. Mon. (Ky.) 144.

⁴ *George v. Strange*, 10 Grat. (Va.) 499; *Pearce v. Winter Iron Works*, 32 Ala. 68; *Rives v. Rives*, 7 Rich. (S. C.) 353; *Brady v. Hancock*, 17 Tex. 361.

⁵ *Sayre's Adm'r v. Harpold*, 33 W. Va. 553; 11 S. E. 16. A bill in

§ 154. **Same — Matters of Offset which are available.** — A complainant will not be entitled to restrain a judgment to enable him to avail himself of set-offs only recoverable in a court of equity. It is necessary that the party should have been deprived without his fault of an opportunity to avail himself of the offset before the recovery of the judgment; and he must show, that owing to the insolvency of the judgment creditor or for other reason, he will suffer irreparable injury unless an injunction be granted.¹ The rule is that a party going into equity to enjoin a judgment on the ground of offsets must first show as strong a claim to be paid the offsets, as if he were suing at law or in equity on the same.² And in the absence of an allegation of insolvency, the collection of a judgment will not be enjoined pending an action by defendant against plaintiff, defendant desiring to set off the judgment which he may obtain against that rendered against him.³ Nor will a judgment be restrained to enable a defendant to avail himself of a contingent liability which may never arise.⁴

§ 155. **Same — Judgment assigned ; Non-residence of Plaintiff.** — A bill in equity cannot be maintained to restrain the collection of an execution against the plaintiff in favor of the assignee of an insolvent debtor, on the mere ground that the plaintiff has claims against the debtor which might be the subject of set-off, there equity will lie to enjoin one who, by taking the benefit of the Georgia homestead and exemption law, has, in effect, rendered himself insolvent, from enforcing by execution a judgment against a party holding against him an equitable claim equal to the judgment in amount. *Tommey v. Ellis*, 41 Ga. 260.

¹ See *Hudson v. Kline*, 9 Grat. (Va.) 879.

² *Walker v. Ayres*, 1 Iowa, 449. A party sued upon his promissory notes, who neglects to examine them and avail himself of all proper credits, when he has an opportunity to do so, trusting to the plaintiff's assurance that they are credited, is not in a position to seek relief in chancery. *Jarboe v. Kepler*, 4 Ind. 177.

³ *Baker v. Ryan*, 67 Iowa, 708.

⁴ *Heinrichsen v. Reinkack*, 27 Ill. 295.

SET-OFF OF LEGACY AGAINST PRICE OF PROPERTY PURCHASED AT EXECUTOR'S SALE. — Where legatees under a will brought a suit against the executor for their respective legacies, and, upon an account taken, in which the executor was charged with all he had received, or ought to have received, a decree was rendered against the executor in favor of each legatee, for the share due to him, — *held*, that a legatee who had given his bond to the executor for a purchase made by him at the sale of the testator's effects, could have no relief against a suit upon that bond, subsequently brought, and that he should have had it deducted from the amount ascertained to be due to him in the original decree. *Love v. Love*, 6 Ired. (N. C.) Eq. 325.

being no averment to show that the plaintiff for any reason could not have availed himself of his right of set-off in the action in which the judgment against him was recovered.¹

A court of equity cannot restrain the execution of a judgment recovered by a non-resident plaintiff, merely because the defendant has a cross-action at law growing out of the same transaction, but which he cannot prosecute in the courts of the state as long as the plaintiff keeps out of it.²

§ 156. **In Favor of Surety or Indorser on Account of Release of Principal.**—Since the right of a surety to claim his release on account of indulgence given by the obligee to his principal, is strictly legal and purely technical, as a rule, the circumstances are exceptional which will induce a court of equity to enjoin a judgment obtained against sureties, or against them jointly with their principal. And where the creditor failed to issue his *fi. fa.* to the counties where the principal debtor had property, and refused to allow the sureties of the latter to do so, and countermanded an execution which the sureties had procured to be issued, it was held that the sureties had no ground for an injunction to restrain his execution against them.³ But where a judgment was obtained against the maker of a promissory note, and one of them appealed to a special jury, giving bond and new security for the eventual condemnation money, and pending the appeal a suit was brought and judgment obtained against the indorser, and after this the plaintiff dismissed the suit pending on the appeal against the maker, it was held that, on a bill filed by the indorser to enjoin the judgment against him, alleging these facts, and claiming to be discharged by the act of the plaintiff in dismissing the suit on appeal, and thus losing the lien of the first judgment and the security on the appeal, it was error in the judge not to grant the injunction until the hearing, the answer not denying the facts except by hearsay, and, in effect, admitting that the suit had been dismissed.⁴

§ 157. **In Favor of Owner of Cause of Action not a Party.**—Where one acting as agent or in other capacity representative of the real owner of a legal demand, reduces it to judgment and is

¹ Wolcott v. Jones, 4 Allen (Mass.), 367.

² Beall v. Brown, 7 Md. 393. See also Jackson v. Bell, 31 N. J. Eq. 554; s. c. 32 N. J. Eq. 411.

³ Thornton v. Thornton, 63 N. C. 211.

⁴ Lewis v. Armstrong, 47 Ga. 289.

seeking to defraud the real owner of the benefit or proceeds of the same, and such owner has no adequate legal means of protecting himself, equity will interpose by injunction against the judgment until the relative rights of all parties in interest are adjusted.¹ So where one obtained a judgment against another, levied execution on lands with notice of a superior equitable title in a third party to a part, and purchased at the sale, it was held, that he took as trustee for such third party, that he might be enjoined from proceeding on the judgment against his share, and required to release such share to him.² In such case the insolvency of the nominal or representative plaintiff may be an important consideration.³

§ 158. **Conflicting Claims.** — The existence of ample statutory provisions for trying rights of property, and of disputes arising as to the title to property seized under execution or attachment, generally deprives a court of equity of any jurisdiction to interfere in such cases. But sometimes the circumstances are such, that no other remedy than an injunction restraining the sale until a trial of the respective rights of the parties can be had, exactly meets the necessities of the case. Thus, where an obligee having recovered judgment in the circuit court on a bond claimed by the state of Georgia, under an act confiscating British debts, and execution having issued, the state filed a bill in the supreme court setting out its title, whereupon an injunction was issued to stay the money in the hands of the marshal until the state's title could be tried.⁴

The mere fact that one has pending a petition to be made party to a cause in equity, and another petition pending to set aside the decree rendered in said cause, will not hinder him from filing his own bill to recover proceeds of the decree from one of the pre-

¹ *Dunn v. Dunn*, 8 Ala. 784.

² *Gutshall v. Salsberry*, Wright (Ohio), 127.

³ *Sims v. Goodwin*, 31 Ga. 267. In this case one G. recovered judgment against N. in an action for trover of certain slaves. The true title to the slaves was in the estate of an intestate whose administrator filed a bill alleging these facts, and that G. was insolvent, and that N. had no more than sufficient property to satisfy the judgment, and praying that G. be enjoined from enforcing his judgment. It was held that the injunction should be granted, not only to protect the interests of the administrator, but to protect N., who was a party to the proceedings, from the two separate demands for the same property.

⁴ *Georgia v. Brailsford*, 2 Dal. 402.

vailing parties and to enjoin the execution of the decree, so as to hold up such proceeds to abide the result of his bill.¹

§ 159. **Judgment founded upon Usury.** — Relief by injunction will be granted against a judgment obtained upon a usurious contract only upon condition that the complainant do equity by paying what is actually due as principal and legal interest.² But equity will not enjoin a judgment because it is founded on an agreement to compound interests on default of punctual payment of simple interest, whether such agreement was made after or before the simple interest fell due.³ Nor will equity enjoin a judgment for the reason that the amount of the judgment was made up in part of interest which had, by the contract of the parties, been converted into principal after the interest so converted had fallen due, and was payable.⁴

§ 160. **Same — On Gaming and other Void Contracts.** — A court of equity will restrain even an innocent *bona fide* assignee for value, of a security given for money lost in gaming, from enforcing his claim, even upon a judgment already obtained.⁵ But where on a bill filed to enjoin a judgment, on the ground that the debt on which it was founded was for money won at cards, it was doubtful, on the evidence, whether such was the consideration, or, if it was, whether the plaintiff in the judgment, who was a transferee of the debt, had not been induced by the concealment or misrepresentation of the debtor to believe that the consideration of said debt was good and lawful, though the court should not dismiss the bill, yet it should continue the injunction, and direct an issue to ascertain the facts.⁶

Equity will relieve against a judgment at law upon a void contract, although the defence might have been made at law.⁷ But where an illegal contract has been partially performed, and the party who has received the benefit of such performance given a judgment for the value, a court of equity will not relieve him

¹ *Alsbaugh v. Adams*, 80 Ga. 345; 5 S. E. 496.

² *Ennis v. Ginn*, 5 Del. Ch. 180. In *Lansing v. Eddy*, 1 Johns. (N. Y.) Ch. 49, it was held that an injunction will not be granted to stay a sale under an execution on the ground of usury, that being good defence at law.

³ *Hale v. Hale*, 1 Coldw. (Tenn.) 233.

⁴ *Parham v. Pulliam*, 5 Coldw. (Tenn.) 497.

⁵ *Cough v. Pratt*, 9 Md. 526.

⁶ *Nelson v. Armstrong*, 5 Grat. (Va.) 354.

⁷ *Lucas v. Waul*, 20 Miss. (12 Smed. & M.) 157.

from the judgment, although the amount could not have been recovered at law on account of the illegality of the contract.¹

§ 161. **In Favor of Garnishee.** — A garnishee may enjoin the plaintiff where his defence is that, for a consideration, the plaintiff promised to pay the debt garnished;² also where he can show that the judgment against him was obtained by fraudulent conduct of the opposite party, wholly unaffected by any fault or negligence of his own.³

B. INJUNCTION DIRECTED AGAINST THE EXECUTION.

§ 162. Sales upon Execution.

163. Same — Illegal Sales.

164. Same — Irreparable Injury.

165. Sale of Property of one no a
Party — Realty.

§ 166. Same — Personalty.

167. Same — Conflicting Claims.

168. When Execution of Writ of Possession enjoined.

§ 162. **Sales upon Execution.** — A court of equity does not, as of course, assume jurisdiction to take executions upon judgments at law into its own hands, as such power would be oppressive, both to the debtor and to the court;⁴ and yet chancery will grant an injunction to prevent a party making use of a legal writ of execution for the purpose of vexation and injustice.⁵ Restraint of sales upon execution in proper cases is a well-established part and parcel of the jurisdiction to grant relief against the enforcement of judgments, being in fact usually a consummation of the same object, though occasionally an injunction against proceedings under the execution is proper where no objection lies to the judgment, against whose enforcement in a proper manner there is no ground to interpose. As a general rule, while a judgment exists it is a warrant for the execution, which cannot be restrained for illegalities inherent in the execution itself; and an injunction sought on such grounds will not be granted.⁶

§ 163. **Same — Illegal Sales.** — But courts of equity will, where

¹ *Young v. Beardsley*, 11 Paige (N. Y.), 93.

² *Mathews v. Robinson*, 33 Ala. 320.

³ *Nevins v. McKee*, 61 Tex. 412.

⁴ *Macon, etc. R. R. Co. v. Parker*, 9 Ga. 377; *Wheeler v. Alderman*, (S. C.) 13 S. E. 673.

⁵ *Colt v. Cornwell*, 2 Root (Conn.), 109; *Morris v. Thomas*, 17 Ill. 112; *Bissel v. Bozman*, 2 Dev. (N. C.) Eq. 160; *Garlick v. McArthur*, 6 Wis. 450.

⁶ *Bell v. Francke*, 23 La. An. 599; *E. R. Artman-Treichler Co. v. Giles*, 26 A. 668; 155 Pa. St. 409.

no legal remedy has been provided, and in cases otherwise proper, restrain sales of property illegally taken in execution, although the judgment upon which it issued is entirely valid and binding upon the parties thereto.¹ Thus, an injunction was held properly issued to prevent the sale under execution issued on the judgment of a justice of the peace of property exempt by law from forced sale.² As a general rule no person can enjoin a judgment at law to which he is not a party; but if he is aggrieved by the proceedings thereon, he should pray for an injunction to the execution.³

¹ *Kenyon v. Clarke*, 2 R. I. 67. See also *Naill v. Kansas Farmers' Fire Ins. Co.*, (Kan.) 27 P. 854. But a court of equity will not set aside the levy of an execution upon real estate upon the ground of alleged defects and irregularities in the same. The proper remedy in such case is an application to the court rendering the judgment. *Boles v. Johnson*, 23 Cal. 226; *Hurlburt v. Mayo*, 1 D. Chip. (Vt.) 387. Compare *Ramsden v. O'Keefe*, 9 Minn. 74.

EXEMPT SHARES OF STOCK. — An injunction may be granted to restrain an execution creditor of a city from selling under a levy shares of stock in a corporation formed to maintain works to supply the city with water, such shares being exempt by statute from seizure and sale. *New Orleans v. Morris*, 105 U. S. 600.

² *Stein v. Frieberg*, 64 Tex. 271. And jurisdiction, once having attached, was exercised to finally determine the rights involved under the issues made. See *Dearborn v. Phillips*, 21 Tex. 449, holding that it is error to dismiss a suit brought to enjoin the sale of property on execution, where the plaintiff, having prayed for damages, has stated a case for nominal relief.

PROPERTY SEIZED AFTER DISCHARGE IN INSOLVENCY. — S., an insolvent, after obtaining his final discharge under the insolvent laws, acquired property by his own industry. Subsequently a former judgment creditor sued out a *scire facias* on his judgment, and, after two returns of *nihil*, a fiat was entered. Execution was issued and levied on the subsequently acquired property. The debtor had never made a new promise to pay the debt, and had no notice of the *scire facias* and the proceedings under it until his property was seized. *Held*, that S. had a valid legal defence to the *scire facias*, which, without any fault on his part, he was deprived of the opportunity of pleading, and his legal remedy not being full and adequate, he was entitled to relief in equity, and an injunction to restrain proceedings under the execution. *Starr v. Heckert*, 32 Md. 267.

Instances of injunctions refused on the ground of adequate legal remedies under the peculiar provisions of the Georgia Code, §§ 3741, 3908, the "claim-law," and similar acts prescribing the practice for the adjustment of equities upon judicial sales, etc. *Gatewood v. City Bank of Macon*, 49 Ga. 45; *Lee v. Clark*, Id. 81; *Tompkins v. Tumlin*, Id. 460. No injunction to stay a sale under the Maryland act of 1826, ch. 192, can be granted, unless the bill be filed by the party, and contain the allegations required by § 8 of that act. *Gayle v. Fattle*, 14 Md. 69.

³ *Jordan v. Williams*, 3 Rand. (Va.) 501. The statute limiting the time for issuing executions upon judgments to five years is applicable to a decree of foreclosure and sale of mortgaged premises, as well as to personal judg-

Any irregularity or omission in the proceedings to procure a judicial sale, which would warrant setting the sale aside, if it had been made, — such as an omission to give a defendant notice of the judgment, as required by law, before seizure of his property for sale on execution, — ought to be deemed ground for enjoining the sale, on proper application, before it is made.¹ But when fraud, mistake, surprise, or accident in conducting or appertaining to the sale are relied upon, the court will require the clearest and most conclusive proof.²

§ 164. **Same — Irreparable Injury.** — Where among the elements of apprehended damage, irremediable at law, the bill showed that the pending illegal seizure of the complainant's stock in trade would utterly destroy his credit and business as a merchant, and deprive him of means of support, an injunction was granted.³ So when it was alleged, that nearly double the property would be sacrificed at a forced sale which would be required at another

ments, and an action to enjoin such sale after the lapse of five years will lie. *Stout v. Macy*, 22 Cal. 647.

SURETIES; NON-JOINDER OF PRINCIPAL. — A., being one of several defendants, prosecuted a writ of error, and the supreme court affirmed the judgment sought to be reversed. Judgment was also rendered against the principal and sureties in the writ of error bond. It was held that the sureties could not enjoin execution from the latter judgment on the ground that the original co-defendants of their principal were not joined in it, nor on the ground that a levy had been made on their property, notwithstanding their principal and his co-defendants had sufficient property to satisfy the execution. *Turner v. Smith*, 9 Tex. 626.

INABILITY TO BID. — Where, on levy of A.'s *fi. fa.*, the sale was suspended by interposition of a claim, and then B.'s *fi. fa.* was levied on the same land, — *held*, that A. was not entitled to an injunction against sale under B.'s levy, on the ground, that the property, if sold pending the claim case, would not bring its value; that A. was, through poverty, unable to bid on it, and that the purchaser would obtain a good title, leaving only a nominal amount in the sheriff's hands to be applied on A.'s *fi. fa.* *Sanders v. Foster*, 66 Ga. 292.

¹ *Lapene v. McCan*, 28 La. An. 749. A mortgagee of his tenant's farm produce, — *held*, to be entitled to an injunction to restrain the sale thereof, under an execution issued on a prior judgment, although he had no such interest as to justify his asking a court to set aside the judgment. *Martin v. Jewell*, 37 Md. 530. Injunction is a proper remedy where plaintiff had an execution issued for the whole amount of his judgment instead of the amount due him, with interest and damages. *Wills Point Bank v. Bates*, 76 Tex. 329; 18 S. W. 309.

² *Skillman v. Holcomb*, 12 N. J. Eq. (1 Beas.) 131; *Hart v. Marshall*, 4 Minn. 294.

³ *McCreery v. Sutherland*, 23 Md. 471. See also *Ford v. Rigby*, 10 Cal. 449.

time to pay the judgments, in consequence of the embarrassments caused by the embargo laws, and an injunction was prayed on such proceedings at law for the present, it was held that the temporary relief prayed should be granted.¹ But an injunction against the sheriff will not lie, at the instance of a purchaser of a partner's interest, to restrain a sale on execution of such partner's interest in firm stock, unless the injury be irreparable, which can only appear upon a clear showing of the plaintiff's right, and of the defendant's insolvency.² And where the object of a bill will be answered by restraining the proceeds of a sheriff's sale in his hands, the sale ought not to be enjoined.³

§ 165. **Sale of Property of one not a Party — Realty.** — On the question whether an injunction should be granted to restrain a sale of realty the title to which is in a third party, there is some conflict of authority. In several early cases it was decided that a sheriff's sale and deed thereunder should be enjoined.⁴ But in many, and especially in several late well-considered cases, it has been decided that such sale should not be enjoined where it can pass no title, for the reason that it can cast no cloud upon the title; and this may now be accepted as the established rule.⁵ But it is

¹ *Ex parte Gimball*, T. U. P. Charl't. (Ga.) 153.

² *More v. Ord*, 15 Cal. 204. The sale of a homestead, in payment of a judgment, will not be enjoined, on the ground that the judgment debtor has other property not exempt from execution, and upon which the execution should first be levied, unless the fact is made to appear. *Hale v. Heaslip*, 16 Iowa, 451.

³ *Morris Canal, etc. v. Biddle*, 4 N. J. Eq. (3 Green) 222. An injunction upon an execution sale *granted* where the fact of the release of the judgment was in issue, and the bill sought to quiet the title to a number of lots by one final decree. *Kendall v. Dow*, 46 Ga. 607.

⁴ *Budd v. Long*, 13 Fla. 288; *King v. Clay*, 34 Ark. 291; *Hurd v. Eaton*, 28 Ill. 122; *Cropper v. Coburn*, 2 Curt. 465; *Cox v. Mayor, etc. of Griffin*, 17 Ga. 249. In *Calhune v. Cozens*, 3 Ala. 496, it was held that where the separate estate of a wife is levied on for the debt of her husband, an injunction may be obtained to stay the sale, in default of any other remedy.

⁵ *Appeal of Small*, (Pa.) 9 A. 337; *Drake v. Jones*, 27 Mo. 428; *Purinton v. Davis*, 66 Tex. 455; 1 S. W. 843; *Roman Catholic Archbishop of San Francisco v. Shipman*, 69 Cal. 586; 11 P. 348; *McPhee v. Veal*, 76 Ga. 656; *Jones v. Word*, 61 Ga. 26; *Sheldon v. Stokes*, 34 N. J. Eq. 87; *Dawes v. Taylor*, 35 N. J. Eq. 40. See also *Watkins v. Logan*, 3 T. B. Mon. (Ky.) 20; *Poage v. Bell*, 3 Rand. (Va.) 586; *Bowyer v. Creigh*, Id. 25. "A court of equity will not ordinarily interfere to enjoin a sale of lands under an execution against one person, the title to which is claimed by another; for the sale will not prejudice the rights of the latter, and the question of title is one for a court of law. Equity will only interfere in case there is some recognized

held that equity will, at the suit of persons holding the complete equitable title to land, restrain as to their estate the levy of an execution issued on a judgment against the person holding the legal title.¹ When plaintiff in injunction seeks to restrain the execution of a judgment, on the ground that the property seized belongs to him and not to the judgment debtor, the only issue in the case is that of title.² In Pennsylvania an injunction against the sale on execution of land in which the judgment debtor is believed to have an interest will only be granted where the creditor is clearly seen to be abusing the process of the law to the injury of another;³ and an injunction will not be granted to restrain the sale of real estate alleged to be the wife's, on an execution against the husband, unless in a case where clearly the husband can have no interest whatever.⁴

§ 166. **Same — Personalty.** — It is almost an unbending rule of courts of equity to refrain from interfering with sales under execution, of personalty, deeming, as has been before stated,⁵ legal remedies entirely adequate.⁶ But a different view seems to have once prevailed in Virginia and West Virginia, where it was held that relief will be granted in such cases notwithstanding a statute providing for the taking of an indemnifying bond by the officer levying on the property.⁷ And in Kansas it was recently held that a temporary injunction may be granted to restrain the sale

ground for equitable relief." *American Dock & Improvement Co. v. School Trustees*, 35 N. J. Eq. 181. For fuller discussion and additional authorities see *infra*, §§ 197, 198.

¹ *Parks v. People's Bank*, 97 Mo. 130; 11 S. W. 41.

² *Basso v. Benker*, 33 La. An. 432.

THE ALLEGATIONS. — Where, in a suit between A. and B., judgment was rendered that A. recover against B. a certain sum, and that certain described lands be sold to satisfy the judgment, another claimant to the land, in order to enable him to obtain an injunction against the sale thereof, must show by what title he claims, or that B. had no title; must state facts showing that the judgment was obtained by fraud and collusion between A. and B.; must allege that he is in possession, or that he will suffer loss or damage by the sale, and that he was ignorant of the pendency of the suit in which the judgment was rendered. *Henderson v. Morrill*, 12 Tex. 1.

³ *Taylor's Appeal*, 93 Pa. St. 21.

⁴ *Boyle v. Ramsey*, 1 (Pa.) Leg. Gaz. Rep. 45.

⁵ *Supra*, § 149.

⁶ *Stilwell v. Oliver*, 35 Ark. 184; *Erdman v. Rosenthal*, 60 Md. 312; *Warner v. Pain*, 3 Barb. (N. Y.) 630. See also *Jones v. Jones*, 13 Iowa, 276; *Smyth v. Barbee*, 9 Lea (Tenn.), 173.

⁷ *Wilson v. Butler*, 3 Munf. (Va.) 559; *Walker v. Hunt*, 2 W. Va. 491.

of personal property, when it appears that such property is *in custodia legis*, and is not subject to the satisfaction of the judgment under which the execution issued, and a sale of the same would confer no title on the purchaser.¹

§ 167. **Same — Conflicting Claims** — One of the few exceptions to this rule is found in cases where, by reason of numerous and conflicting and confused claims to personal property seized on execution, it is plainly apparent that it can only be sold at a ruinous sacrifice. In such case the execution debtor will be entitled to an injunction restraining the sale until his title may be established by a proper proceeding.² An injunction will be granted upon application of junior judgment creditors who have had their executions levied upon property to which there are conflicting claims and for which several indemnifying bonds have been given the sheriff with different sets of indemnitors.³ But equity will not enjoin a sale under an execution against a third person where plaintiff's only equity is that of a *bona fide* purchaser.⁴

§ 168. **When Execution of Writ of Possession enjoined.** — The execution of a warrant issued on a final order in summary proceedings for the recovery of the possession of land will be enjoined only where an injunction would be granted to stay the execution of a final judgment in ejectment. It must be shown, either that the judgment is oppressively used, or that plaintiff has ceased to own the premises, or that defendant, since the entry of the judgment, has acquired an interest that should be protected, or that the judgment was obtained by fraud or collusion.⁵ Where a *bona fide* dispute arises concerning the

¹ *Ryan v. Parris*, (Kan.) 30 P. 172.

² *Huntington v. Bell*, 2 Port. (Ala.) 51; *Garretson v. Appleton Manuf'g Co.*, 61 Ill. App. 443. Compare *Henderson v. Bates*, 3 Blackf. (Ind.) 460.

³ *Newcomb v. Irving Nat. Bank*, 4 N. Y. S. 37, 39, holding that where several levies are made for which there are several indemnitors, and where consequently it is uncertain for what property each indemnitor is liable, there is no certain and adequate remedy at law for the levy, if wrongful, and a creditor, on sufficient security being given, should be restrained from enforcing his execution until the rights of the parties are determined. Same principle, *National Park Bank v. Goddard*, (Sup.) 16 N. Y. S. 343.

⁴ *Manistique Lumbering Co. v. Lovejoy*, 55 Mich. 189.

⁵ *Knox v. McDonald*, 25 Hun (N. Y.), 268. The execution of a warrant of dispossession, in summary proceedings to remove a tenant, will be stayed by injunction, where it appears that the defendant had not time to reach the court room in season for the hearing, after summons had been served upon him. *Griffith v. Brown*, 3 Robt. (N. Y.) 624.

boundaries of the premises to be delivered under the writ, an injunction will be granted until the true boundaries are ascertained.¹ But relief will not be granted where the issues presented are the same as in the ejectment proceeding, though new parties are made co-defendants, who however claim nothing for themselves.² A court of equity cannot interpose by injunction, to restrain the plaintiff, who has obtained judgment, on a writ of forcible entry and detainer, from having restitution of the possession, notwithstanding that he is insolvent and the complainant holds the undisputed legal title to the land.³ To warrant an injunction against final process there must be shown either fraud, collusion, or other equitable grounds or want of jurisdiction on the part of the court wherein the proceedings were had.⁴ And where a writ of possession, under the statute, had been awarded by a court of law, it was held that to enjoin the issuing of such writ in favor of a purchaser of lands, at a sale under an execution against a party in possession, there being no allegation or pretence that waste might be committed, or irreparable mischief done, was a clear abuse of the writ of injunction.⁵

¹ Jones v. Brandon, 60 Miss. 556.

² Robinson v. Veal, 78 Ga. 301. The execution of the warrant in summary proceedings for dispossession of a tenant will not be stayed when the plaintiff has a remedy at law. The remedy by injunction is confined to cases and conditions in which it might be granted to stay the execution of a judgment in an action of ejectment. Broadwell v. Hubbell, 65 How. (N. Y.) Pr. 502.

³ Hamilton v. Adams, 15 Ala. 596.

⁴ Koster v. Van Schaick, 11 Daly (N. Y.), 205.

⁵ Blakeney v. Ferguson, 14 Ark. 641. The associate judges of one county have no authority in vacation to restrain by injunction the execution of a writ of *habere facias possessionem* directed to the sheriff of another county. State v. Michaels, 8 Blackf. (Ind.) 436.

BETWEEN SENIOR AND JUNIOR PATENTEE. — A., the elder patentee in possession, brought his bill against the junior patentee, for an injunction to the execution of a writ of *ha. fa.* against his tenant upon whom there had been no service of notice, and for a release of the claim. *Held*, that the bill might be sustained under the statute authorizing the holder of the elder grant to try the merits of the junior patent, though there could be no injunction to such an execution. Jones v. Chiles, 3 T. B. Mon. (Ky.) 340.

III. PARTIAL AND CONDITIONAL RELIEF.

§ 169. Injunction against Part of Judgment on Part Payment.

170. Same — Tender of Lien of Judgment for Part due.

§ 171. Relief on Terms and Conditions.

172. Same — Payment into Court.

§ 169. **Injunction against Part of Judgment on Part Payment.** — Where it appears or is admitted that a judgment though illegally rendered is based in part upon a just indebtedness, an injunction will not be granted restraining the collection of such part.¹ Thus where a justice's judgment had been obtained without service, upon the admission of the party that he really owed the debt, the court having acquired jurisdiction of the controversy terminated it by continuing the injunction as to the justice's costs, but giving judgment to the respondent for the debt.² And where the execution of a judgment had been enjoined, and defendant admitted upon being interrogated a partial payment of such judgment, it was held the injunction should be perpetuated for the amount admitted to have been paid, and dissolved for the remainder still due.³ But where the bill was in the

¹ *Hale v. Bozeman*, 60 Miss. 965; *Crisswell v. Bledsoe*, 22 Tex. 656. Where there has been an error committed in issuing a writ of *fi. fa.* for more than the plaintiff is entitled to under the judgment, the right to enjoin is limited to the erroneous excess. *Barrow v. Robichaux*, 14 La. An. 207.

² *Wills v. Gordon*, 22 Tex. 241.

³ *Perry v. Kearney*, 14 La. An. 400.

CONDITIONAL SALE; FAILURE OF CONDITION; JUDGMENT FOR PURCHASE-MONEY. — Complainant alleged by his bill that he had purchased certain land from defendant conditionally, taking a deed therefor, and giving a note for the purchase-money; that, upon the failure of such condition, he tendered the deed, and demanded his note; that defendant refused to receive the deed or to deliver up the note, insisting upon the transaction as an absolute sale; that defendant had recovered a judgment against complainant for the principal and interest of the note, and was about to sell the land under the execution thereon; that the defendant had been in control of the property since the sale, and had refused to deliver possession thereof to complainant; and he had received the rents thereof, and had sold a large amount of timber therefrom, and that he was insolvent. A writ of injunction was prayed. *Held*, that further proceedings under the execution should be enjoined; that the defendant was entitled to the balance of the purchase-money after crediting the same with the value of the rents and the damage done to the property by his waste, and the complainant to the possession of the land. *Odell v. Reed*, 54 Ga. 142.

JUDGMENT ON STOCK SUBSCRIPTION. — A railroad company recovered judgment against A. on his contract of subscription to its stock and bonds. It

nature of an interpleader, the whole judgment was enjoined although the bill only asked an injunction against part of it.¹ And where, on relieving against a judgment, there is no means of ascertaining how far it is correct, but only that it is unconscionable to some extent, it will be set aside *in toto*.²

§ 170. **Same — Tender or Lien of Judgment for Part due.** — An injunction to restrain the enforcement of a judgment at law, on the ground that there is a good defence to a part of the claim on which the judgment was founded, which did not come to the knowledge of the defendant in time to be pleaded, should not be granted unless the bill contains a tender of the amount admitted to be due.³ The court will usually, however, allow the judgment to stand as security for the amount found or admitted to be due.⁴

§ 171. **Relief on Terms and Conditions.** — A party who asks an injunction to restrain the collection of a judgment, or of an ascertained and admitted debt, secured by mortgage, must pay, or offer to pay, what he really owes, or show some sufficient excuse for his failure; otherwise his application for relief will be denied.⁵ On a bill for injunction against a judgment on the ground that the rate of interest in the contract on which it was rendered was usurious, the court granted the writ on condition that the judgment be paid to the extent of the principal and legal interest.⁶ On the same principle it was held that a surety could not enjoin an assignee from enforcing a judgment recovered by the principal against the surety on the ground that he, as surety, had paid a portion of a smaller judgment against his principal who was then insolvent, without offering to pay the

was held in A.'s suit in equity for relief, that while defences, such as that the company was insolvent, that the stock and bonds could not be delivered, that there was false swearing at the trial, etc., should have been interposed on the trial, yet that equity would relieve to the extent of requiring that A. have a *pro rata* share of the proceeds of the foreclosure, and the benefit of a set-off of a certain note against the company. *Galena & Southern Wisconsin R. R. Co. v. Ennor*, 116 Ill. 55.

¹ *Weikil v. Cate*, 58 Md. 105.

² *McRae v. Woods*, 2 Wash. (Va.) 80.

³ *Hill v. Harris*, 42 Ga. 412.

⁴ *Hadley v. Rountree*, 6 Jones (N. C.) Eq. 107.

⁵ *Yonge v. Shepperd*, 44 Ala. 315; *Russell v. Cleary*, 105 Ind. 502; 5 N. E. 414; *Small v. Collins*, 5 Del. Ch. 234; *Levy v. Steinbach*, 43 Md. 212.

⁶ *Allen v. Etheridge*, 84 Ga. 550; 11 S. E. 136.

excess of that judgment over his claim.¹ So where there is a judgment, and also a decree against a party for the same demand, the collection of the money under the decree cannot be enjoined, unless the complainant allege in his bill that the judgment has been satisfied.²

§ 172. **Same — Payment into Court.** — In the absence of a statute positively requiring it, a court of chancery will not usually require the complainant to pay the amount admitted or found to be due into court unless there is danger of his insolvency.³ In Alabama,⁴ New Jersey,⁵ and North Carolina⁶ there are statutes peremptorily requiring it. Under such statutes the money must be actually delivered into the hands of the clerk; a tender to the judgment creditor is insufficient.⁷

IV. EFFECT UPON PARTIES AND PROCEEDINGS IN LAW COURT.

§ 173. Effect upon Status.

174. Same — Death of Party; Lien; Payment pending Injunction Suit, etc.

175. Effect upon other Litigation between Parties.

§ 176. Whether Judgment a Release of Errors.

177. Injunction pending Appeal.

178. Effect upon Execution.

179. Effect upon Plea of Statute of Limitations.

§ 173. **Effect upon Status.** — Execution may issue on a judgment enjoined in equity, as soon as the injunction is dissolved, without leave of court; and where such injunction against a judgment in ejectment is reinstated by an order of a judge act-

¹ *Smith v. Smith*, 75 Tex. 410; 12 S. W. 678.

PAYMENT OF COSTS AND INTEREST. — The collection of an execution issued on a judgment for costs will not be enjoined on the ground that the execution is for a larger sum than the costs as taxed, where it does not appear that the judgment debtor has paid, not only the amount of costs as taxed, but also interest on the same, since a judgment for costs bears interest. *Eaton v. Markley*, 126 Ind. 123; 25 N. E. 150.

² *Dunham v. Collier*, 1 Greene (Iowa), 54. An order for injunction to a sale under execution is not effectual until the execution of the bond required by the order. *Pell v. Lander*, 8 B. Mon. (Ky.) 554.

³ *Rodgers v. Rodgers*, 1 Paige (N. Y.), 426.

⁴ *J. A. Roebling Sons Co. v. Stevens Electric Light Co.*, (Ala.) 9 So. 369.

⁵ *Phillips v. Pullen*, 45 N. J. Eq. 157; 16 A. 915.

⁶ *Pugh v. Maer*, 4 Hawks (N. C.), 362.

⁷ *J. A. Roebling Sons Co. v. Stevens Electric Light Co.*, (Ala.) 9 So. 369.

ing in the capacity of chancellor, it does not render the proceeding at law irregular by relation, nor require the court below to award a writ of restitution to the party who has been dispossessed in the mean time.¹ And where it appeared that the complainant obtained possession by collusion with the tenant, against whom the ejectment had been brought, and obtained the reinstatement by presenting to the judge an incorrect transcript of the record, it was held that he was not entitled to restitution.² An injunction restraining the levy of an execution precludes the creditor from placing it in the officer's hands though no sale is made.³ On the other hand, if proceedings on a judgment at law be enjoined by a court of chancery, and the injunction is afterwards dissolved, and, on appeal, the order of dissolution is wholly affirmed, an execution may be sued out on a judgment at law, before the decree of affirmance is entered up in the court of chancery.⁴

§ 174. **Same — Death of Party; Lien; Payment pending Injunction Suit, etc.** — A judgment suspended by an injunction may be revived on the death of either party; and the injunction operates on the judgment of *sci. fa.*, prohibiting the issue of execution thereon.⁵

Where execution of a judgment is restrained by injunction, until the lien is lost by limitation, the party proceeding by injunction, upon its dissolution, cannot take advantage of such loss of the lien.⁶

Where an injunction is granted on a bill to enjoin a judgment, and afterwards dissolved, and the judgment is collected pending the bill, the court, on final decree perpetually enjoining the judgment, may decree the money paid on the judgment to be refunded, though there is no prayer for that particular relief in the bill, but only a prayer for general relief.⁷

¹ *Young v. Davis*, 1 T. B. Mon. (Ky.) 152. See *Sugg v. Thrasher*, 30 Miss. 135. Upon the dissolution of an injunction against service of an execution, the parties are restored to the same position which they occupied before it was granted. *Duckett v. Dalrymple*, 1 Rich. (S. C.) 143.

² *Young v. Davis*, 1 T. B. Mon. (Ky.) 152.

³ *Sugg v. Thrasher*, 30 Miss. 135.

⁴ *Eppes v. Dudley*, 4 Leigh (Va.), 145.

⁵ *Richardson v. Prince George*, 11 Grat. (Va.) 190.

⁶ *Work v. Harper*, 31 Miss. 107.

⁷ *Bryan v. Primm*, 1 Breese (Ill.), 33.

Where an injunction, which has been granted to restrain the proceedings to complete sales made under an execution, and to set aside such sales, has been dissolved, the court of chancery has no power to render a judgment against the complainant for the amount of a judgment at law in his favor.¹

§ 175. **Effect upon other Litigation between Parties.** — An injunction will not be allowed to affect other matters or proceedings than those upon which the application for it was based. Thus, where a judgment on a bill of exchange against an acceptor was enjoined, it was held not to enjoin suits against the other parties to the bill.²

A party has no right to enjoin the execution of a judgment, absolute and unconditional as to the matters it professed to decide, during a litigation as to other matters in controversy reserved by the judgment.³ And where a decree in chancery had been reversed on the ground that fraud had been practised in obtaining it, and the party was restored to his former situation, and an action at law had been brought for damages sustained by reason of the fraud, it was held that chancery would not grant an injunction against the suit at law, on an application made by the other party for that purpose.⁴

§ 176. **Whether Judgment a Release of Errors.** — Even in the absence of statutory provisions on the subject, courts of equity in

¹ McDonald v. Cook, 11 Mo. 632.

² Bohannon v. Combs, 12 B. Mon. (Ky.) 563.

FORECLOSURE OF MORTGAGE AND ACTION FOR SAME INDEBTEDNESS. — Where a mortgagee has a judgment at law, there need be no decree *in personam* against the mortgagor praying to be permitted to redeem, but the amount to be paid should be fixed by the decree, and if paid by a certain day the injunction should be perpetuated, and the defendant's claim released, and, if not paid, the property should be sold; and where the property was in the mortgagor's hands, if not surrendered to be sold, and the money could not be got from the complainant, the bill should be dismissed, and the injunction dissolved. Chaney v. Cooke, 5 T. B. Mon. (Ky.) 248.

³ Hereford v. Babin, 14 La. An. 333. A judgment at law against two may be annulled by a decree of a court of chancery as to one, and remain binding as to the other defendant. Kennedy v. Evans, 31 Ill. 258.

⁴ Peck v. Woodbridge, 3 Day (Conn.), 508.

NOTICE TO PROBATE JUDGE; SETTLEMENT OF ESTATE. — Where the judge of an orphans' court is advised that an injunction has been granted at the instance of the executor of an estate to restrain the heirs and distributees from proceeding with a settlement begun in said court, it is a sufficient reason why he should suspend all further proceeding as long as the judgment continues in force. State v. The Judge, 15 Ala. 740.

granting injunctions against judgments will require the complainant to release all errors or irregularities inherent in the judgment or which may have been committed in obtaining it.¹ This well-established rule has been given statutory expression in one or two states.² But an injunction to stay proceedings on a judgment at law does not operate as a release of errors where it is to stay proceedings in violation of law.³ Nor does an injunction to restrain a judgment plaintiff from further proceedings under his execution, without seeking in any way to stay the judgment, operate as a release of errors.⁴

§ 177. *Injunction pending Appeal.* — For the purpose of maintaining the *status quo* the supreme court can grant an injunction against enforcing a judgment of the lower court pending an appeal therefrom.⁵ But equity will not enjoin further proceedings on an execution issued by a lower court after an appeal has been taken.⁶ Application should be made to the appellate court for a *supersedeas*.

§ 178. *Effect upon Execution.* — The effect of an injunction of an execution sale is to stop the proceedings where they are. But such injunction does not operate to kill the execution, or to destroy or impair a levy made under it. It is, therefore, competent for the sheriff holding such writ of execution to go on after the dissolution of the injunction, and even after the expiration of his term of office, and complete the proceedings commenced by him.⁷ And where property has been seized and is about to be sold, under judicial process, and the sale is arrested by injunction, the seizure is not released; and the property still remains in legal custody, pending the injunction.⁸

¹ See *Addleman v. Mormon*, 7 Blackf. (Ind.) 31; *Bradley v. Lamb*, Hard. (Ky.) 527; *Price v. Johnson County*, 15 Mo. 433.

² *Henly v. Robertson*, 4 Yerg. (Tenn.) 172; *Sevier v. Ross*, 1 Freem. (Miss.) Ch. 519.

³ *Burge v. Burns*, 1 Morr. (Iowa) 287.

⁴ *St. Louis, etc. R. R. Co. v. Todd*, 40 Ill. 89. That the issue of the injunction does not, however, operate as a release of all errors in a chancery proceeding, see *San Juan & St. Louis Mining, etc. Co. v. Finch*, 6 Col. 214.

⁵ *Leach v. State*, 78 Ind. 570.

⁶ *Scanlan v. Mixer*, 34 Ark. 354.

⁷ *Knox v. Randall*, 24 Minn. 479.

⁸ *Lamorer v. Cox*, 32 La. An. 246. Pending appeal by defendant from a judgment enjoining the operation of certain machinery on certain premises, it is in the discretion of the trial court to stay enforcement of the judgment. *Pach v. Geoffroy*, (Sup.) 19 N. Y. S. 583. The same case also holds that it is

§ 179. **Effect upon Plea of Statute of Limitations.** — When execution upon a judgment at law has been restrained by an injunction, improperly obtained, until the judgment is barred by the statute of limitations, a court of equity will, upon the dissolution of the injunction, provide an adequate remedy by enjoining the judgment debtor from pleading the statute of limitations.¹

improper to require, in such case, as a condition of staying the enforcement of an injunction pending appeal, an undertaking to pay liquidated damages in case of affirmance.

¹ *Marshall v. Minter*, 43 Miss. 666.

CHAPTER IV.

PERTAINING TO REAL PROPERTY.

- I. IN MATTERS PERTAINING TO TITLE.
- II. TO PROTECT POSSESSORY RIGHTS.
- III. PROTECTION OF EASEMENTS.
- IV. TO PREVENT DESTRUCTION OF AND INJURY TO SUBSTANCE, OR WASTE.
- V. TO PREVENT ILLEGAL TAKING AND INJURY UNDER CLAIM OF PUBLIC RIGHT.

I. IN MATTERS PERTAINING TO TITLE.

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| <p>§ 180. Basis of the Jurisdiction.</p> <p>181. General Principles.</p> <p>182. When Party not restrained from asserting Title in himself.</p> <p>183. Protection of Equitable Liens.</p> <p>184. Action for Purchase-money; Failure of Title.</p> <p>185. Same — Proceeding for Partition.</p> <p>186. Same — Non-resident Vendor.</p> <p>187. Unrecorded Conveyance; Subsequent Creditors.</p> <p>188. Failure of Title to Mortgaged School Lands.</p> <p>189. Jurisdiction in Actions of Ejectment.</p> <p>190. Same — Mining Property; Mistake in Grant from State.</p> <p>191. Same — Particular Relations.</p> | <p>§ 192. Same — Modified and Temporary Relief.</p> <p>193. Between Tenants in Common.</p> <p>194. Fraudulent Transfer; Cloud on Title.</p> <p>195. Same — <i>Pendente lite</i>.</p> <p>196. Sale of Homestead.</p> <p>197. Void Execution Sale — Cloud on Title.</p> <p>198. Circumstances justifying Interference.</p> <p>199. Same — Sale of Lands of Married Woman for Judgment Debt of Husband.</p> <p>200. Restraining Execution of Deed under Fraudulent and Void Tax Sale.</p> <p>201. Relief on Ground of Accident.</p> |
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§ 180. **Basis of the Jurisdiction.** — Although many cases appear to have deviated from the principle, yet it is the well-established policy and rule of courts of equity to refrain from interfering in controverted questions involving titles, which may be settled in a legal forum. The inadequacy of legal remedies to afford protection is the principal ground of jurisdiction in all questions pertaining to real estate, and in matters involving the title. Undoubtedly in most cases the jurisdiction can only be justified upon grounds of fraud, accident, or mistake. If ever warranted

at all on other grounds, it is only under very extraordinary circumstances, established with great certainty of proof.¹

§ 181. **General Principles.** — A court of law is the proper tribunal to investigate the legal title, and a court of equity will only interfere to protect an equitable against a strictly legal title, or compel a discovery to protect the legal title.² For instance, where defendant is in possession under an equitable title which is not available as a defence in an action at law to recover the possession, a proper case is presented for the interference of equity by injunction on account of the inadequacy of the remedy at law.³ A mere denial by defendant of plaintiff's title will not alone warrant a refusal to grant an injunction, especially in cases of irreparable injury.⁴ But ordinarily the injunction will be refused against a defendant in possession, claiming title until the title is established at law.⁵ Upon an application for an injunction affecting the title to real estate the proper office of the court is not to ascertain the legal existence of a right, but solely to protect the property until that right can be determined by the tribunal to which it properly belongs.⁶ An

¹ *Cook v. Burnley*, 45 Tex. 97. See also *Cameron v. White*, 3 Tex. 152; *Rogers v. Cross*, 3 Chand. 84; *Evans v. Lovengood*, 1 Jones Eq. 298.

² *Philhower v. Todd*, 11 N. J. Eq. (3 Stock.) 54. See also *Smith v. Jame-son*, 91 Mo. 13, where it is said that injunction does not lie as an original and independent proceeding, to determine the title to land and mines located thereunder, where the same are held by defendants under claim of right and color of title.

³ *De Groot v. Receivers*, 2 Green Ch. 198; *Coughron v. Swift*, 18 Ill. 414; *Schlecht's Appeal*, 60 Pa. St. 172; *Oakley v. Williamsburgh*, 6 Paige (N. Y.), 262; *Pfeltz v. Pfeltz*, 14 Md. 376; *Pixley v. Huggins*, 15 Cal. 127; *Tomlinson v. Rubio*, 16 Cal. 202; *Uhl v. May*, 5 Neb. 157; *Tevis v. Ellis*, 25 Cal. 515; *Vogler v. Montgomery*, 54 Mo. 577; *Christie v. Hale*, 46 Ill. 117; *Bennett v. McFadden*, 61 Ill. 334; *Pettitt v. Shepherd*, 5 Paige (N. Y.), 493; *Key, etc. Co. v. Munsell*, 19 Iowa, 805.

⁴ *Catlin v. Valentine*, 9 Paige (N. Y.), 575; *Lamb v. Drew*, 20 Iowa, 15; *Crawford v. Paine*, 19 Iowa, 172; *Att'y-General v. Nichol*, 16 Ves. 838.

⁵ *Eskridge v. Eskridge*, 51 Miss. 522; *Chesapeake, etc. Co. v. Young*, 3 Md. 480; *Jersey City Gas Light Co. v. Consumers' Gas Co.*, 40 N. J. Eq. 427; *McNamee v. Alexander*, 109 N. C. 242; 13 S. E. 777; *Pillsworth v. Hopton*, 6 Ves. 50; *Perry v. Parker*, 1 Woodb. & M. (U. S.) 280; *Smith v. Collyer*, 8 Ves. 89; *Carr v. Pensacola City Co.*, 19 Fla. 266; *Hart v. Mayor, etc. of Albany*, 9 Wend. N. Y. 571; *Old Telegraph M. Co. v. Central S. Co.*, 1 Utah, 381; *Preston v. Smith*, 26 Fed. Rep. 884; *Echelkamp v. Schrader*, 45 Mo. 505.

⁶ *Clayton v. Shoemaker*, 67 Md. 220; *Perry v. Parker*, 1 Woodb. & M. (U. S.) 280; *Pillsworth v. Hopton*, 6 Ves. 50; *Smith v. Collyer*, 8 Ves. 89;

injunction should usually be confined to preserving the property and the rights of the parties *in statu quo* pending the litigation.¹ Another common use of injunction is to prevent a cloud being cast upon one's title.²

§ 182. **When Party not restrained from asserting Title in himself.** — An injunction will not be granted on a petition alleging that complainant is in possession of land, and has a good title, but apprehends that defendant may attempt to sell it, and asking the court, before his right is invaded, to adjudge his title good, and restrain defendant from interfering with it.³ Nor will a bill in equity be entertained which alleges that the plaintiff was induced by the representations of the defendant to purchase land from a third person; that the defendant afterwards asserted title in himself, and set up his adverse possession to defeat an action at law brought by the plaintiff; that the defendant had possession of the title deeds, and therefore the plaintiff could not show title at law; and praying that the defendant be enjoined from setting up any title against the complainant, and that the complainant be placed in possession of the lands.⁴ Such petitions are deficient in not showing that defendant is claiming

Eskridge v. Eskridge, 51 Miss. 522; *Hart v. Mayor, etc. of Albany*, 9 Wend. (N. Y.) 571; *Gatewood v. Leak*, 99 N. C. 375; *Benner v. Kendall*, 21 Fla. 584; *Smith v. Jameson*, 91 Mo. 31; *East, etc. R. Co. v. East Tennessee, etc. R. Co.*, 75 Ala. 275.

¹ *Hess v. Winder*, 34 Cal. 270. The preservation of mining property pending litigation to try the right rests upon the peculiar nature of the property in dispute. *Kurtz v. Beatty*, 2 Cranch C. C. 699.

² *Thomas v. Simmons*, 103 Ind. 538.

³ *Gatewood v. Leak*, 99 N. C. 363; 6 S. E. 635. See also *Pennsylvania Canal Co. v. Middletown & Harrisburg Turnpike Co.*, (Pa. Com. Pl.) 11 Pa. Co. Ct. R. 582. The fact that a judgment creditor about to sell lands under execution publicly asserts that his lien is prior to that of a certain mortgage on the premises, and that such mortgage is fraudulent, is no ground on which to enjoin his sale at the suit of the mortgagee. *Ruthven v. Mast*, 55 Iowa, 715; 8 N. W. 659, distinguished; *Ramsdell v. Tama Water Power Co.*, (Iowa) 51 N. W. 245.

⁴ *David v. Shepard*, 40 Ala. 587. One who claims the legal title to land under a will has no standing in a court of equity, to ask for an injunction against an ejectment suit brought against him, except where he cannot have at law the relief to which he is entitled; and, if his legal title is sufficient, the principles of equitable estoppel become of no importance. *Shaw v. Chambers*, 48 Mich. 355. See also *Thompson v. Engle*, 4 N. J. Eq. (3 Green) 271. The owner of an equity of redemption, not in possession, is not entitled to an injunction to restrain an action at law by the mortgagee to recover possession of the tenant. *Hall v. Hall*, 46 N. H. 240.

the legal title with any color of right, and in failing to show other than a legal title in the plaintiff. For like reasons a bill in equity will not lie for the purpose of protecting property until some other person can file a bill to settle the right to such property.¹

§ 183. **Protection of Equitable Liens.** — A court of equity has jurisdiction to enjoin a sale of land on execution, on the application of the owner of an equitable lien prior to the lien of the judgment; and having thus obtained jurisdiction, the court will adjust the rights of all the parties.² So when a bill can be maintained against a married woman, upon the ground that the indebtedness is an equitable charge upon her separate estate, equity will protect such equitable lien by injunction.³ But where one is fully protected by a recordation of the lien he will be denied preventive relief in equity.⁴

§ 184. **Action for Purchase-money; Failure of Title.** — The uses of injunction to prevent the enforcement of judgments for purchase-money where it is ascertained that the judgment plaintiff had no title to the premises conveyed, have been already considered.⁵ But a petition alleging that the vendor of land is insolvent and has no title, and praying for an injunction against a judgment against the vendee on his note for the purchase-money, although the time for conveying the land has not yet arrived, shows a present equity for an injunction as well as probable ground for the future action of the court in behalf of the plaintiff, and should not be dismissed on demurrer, though it may be premature.⁶ And an order of seizure and sale to enforce the payment of the purchase-money, may be enjoined on the ground of a deficiency in the quantity of the land sold, which would entitle the vendee to a diminution of the price.⁷ But equity will not relieve against a judgment for the purchase-money of land, on the ground that the vendor had no title,

¹ *Curtis v. Leavitt*, 11 Paige (N. Y.), 386.

² *Parker v. Kelly*, 18 Miss. (10 Smed. & M.) 184; *Grant v. Lathrop*, 23 N. H. (3 Fost.) 67.

³ *Oakley v. Pound*, 14 N. J. Eq. (1 McCart.) 178.

⁴ *Adirondack Ry. Co. v. Indian River Co.*, 50 N. Y. S. 245; 27 App. Div. 326.

⁵ *Supra*, § 149.

⁶ *Kelly v. Kelly*, 2 Duv. (Ky.) 363. See also *Beauchamp v. Putnam*, 34 Ill. 378.

⁷ *Davis v. Millaudon*, 14 La. An. 868.

where, at the time of sale, the vendor gave notice that there were doubts as to the validity of the title, but gave his warranty deed of the land, he being of undoubted ability to answer on the warranty;¹ nor upon the mere claim by a third person of a paramount title which is not alleged by the bill to be valid.²

§ 185. **Same — Proceeding for Partition.** — Proceedings for a partition of real property will be restrained until the repayment of purchase-money advanced by plaintiff for the purchase of defendant's interest. Thus where it was shown that complainant had paid the entire purchase-money upon the purchase of real estate, and had taken the title to himself and defendant jointly, upon the agreement of the latter to pay one-half of the purchase-money, and it was further shown that complainant had paid taxes upon the premises and made valuable improvements thereon, an injunction was granted to restrain the defendant from proceeding with the partition suit until repayment of the purchase-money advanced by the complainant.³

§ 186. **Same — Non-resident Vendor.** — A non-resident who has not a sufficiency of property or effects within the state to make good the damages for the breach of a covenant for quiet enjoyment, will be enjoined from collecting the purchase-money for land, where the title is defective.⁴

§ 187. **Unrecorded Conveyance — Subsequent Creditors.** — Where judgments have been docketed against the grantor before the registration of a conveyance, and are therefore under a statute a superior lien, the grantee is not entitled to enjoin the levy of execution against the grantor, and to compel a settlement of his entire estate among all his creditors in order to save the land conveyed, until all other discoverable assets have been exhausted. His only remedy is by mandate requiring the sale of such other property as the grantor has subject to execution, before selling the particular parcel conveyed, and only so far as this can be done without delaying the executions.⁵

¹ *Merritt v. Hunt*, 4 Ired. (N. C.) Eq. 406.

² *Gayle v. Fattle*, 14 Md. 69.

³ *Maloy v. Sloan*, 44 Vt. 311. For other illustrations of the use of injunction in partition cases see *Brown v. Daniels*, 51 S. W. 991; *Sternberg v. Wolff*, 56 N. J. Eq. 389; *Nicholson v. Campbell*, 15 Tex. Civ. App. 317.

⁴ *Richardson v. Williams*, 3 Jones (N. C.) Eq. 116. See also *Grahm v. Tankersley*, 15 Ala. 634.

⁵ *Francis v. Herren*, 101 N. C. 497; 8 S. E. 353. Acts N. C. 1885, c. 147.

§ 188. **Failure of Title to Mortgaged School Lands.** — A purchaser of land sold as school land cannot enjoin the auditor of the county from selling the land under his mortgage to secure the purchase-money, on the ground that the title to the land was not in the inhabitants of the townships. If the inhabitants had no title, the plaintiff has none; and a sale of the land under the mortgage cannot injure him. He has just such title as the inhabitants of the township had, and he mortgaged back just such title as he received. So held, where there had been no covenant of title, no fraud, no eviction, and where there was no prayer in the foreclosure suit for any personal judgment for deficiency.¹

§ 189. **Jurisdiction in Actions of Ejectment.** — In actions of ejectment where the title is in issue, the jurisdiction of a court of equity extends to remove any impediment to the fair trial of the real question at law, but not to the trial of the question.² Formerly the court would not grant an injunction to restrain proceedings in ejectment except where parties were in trade; in that case the court would, to prevent the inconvenience which would arise by the recovery of a judgment against them, grant an injunction to stay proceedings at law before judgment obtained.³ But at present, as a general rule, where there is a legal as well as an equitable title in a defendant to an ejectment, the court will, at his suit, restrain the proceedings in the action by a party who, if successful, would be a trustee for him,

¹ Cartright v. Briggs, 41 Ind. 184.

² Griffith v. Edwards, 2 Jur. n. s. 584. In this case one G. being, as absolute owner, in possession of a farm, was served with a writ of ejectment, which writ he, being as he alleged illiterate, was unable to read; and having been, by the person who served it, misinformed as to its nature, he suffered judgment to go by default; and subsequently to avoid being turned out of possession, signed a memorandum of agreement for a lease, whereby he (G.) agreed to take the farm from the defendant (the plaintiff in ejectment) for four months at a fixed rent; and G. afterwards set aside the judgment on the ground of surprise, but was met at law by the objection that he had waived all irregularities by attorning to the plaintiff (the defendant in equity). G. filed a bill praying for a declaration that he was, as the heir of E., absolutely entitled in fee simple in possession, and that the memorandum of agreement might be delivered up to be cancelled, and an injunction granted to restrain the defendant from proceeding at law, either upon the agreement or the judgment. The court restrained the defendant from proceeding upon the judgment, and from setting up the agreement in any action or other proceeding at law in respect of the property.

³ Hudson v. Temple, 9 W. R. 243.

although there may be a question whether he would not be successful at law. Thus, if A. is in possession of an estate by a good equitable title, and the legal estate, if not in himself, is in B. as a constructive trustee for him, and B. brings ejectment, A. is entitled to relief by way of injunction, whether the legal estate be in him or not.¹ But an injunction to restrain heirs from prosecuting an ejectment to recover property of the inheritance sold by a trustee to whom their mother, who had a life estate in the premises, had conveyed it in trust for the use of her minor children, on an order to execute release thereof, will not be granted where there is no evidence of consent thereto, or consideration received for the sale by them after their majority.²

§ 190. **Same — Mining Property; Mistake in Grant from State.** — For the purpose of quieting a possession or preventing a multiplicity of actions, or where the value of the inheritance is in jeopardy, or irreparable mischief is threatened, in relation to either mines, quarries, or woodland, equity will interfere by injunction, even against a person acting under a claim of right.³ Where by misrepresentations an act of assembly had been obtained, whereby lands previously sold, in accordance with a former act, are included in a new grant, it was decreed that the second grantee should release such land to the state, by deed, and an ejectment against the claim under the first act was enjoined.⁴

§ 191. **Same — Particular Relations.** — A tenant disclaiming tenure cannot enjoin his lessor from proceeding against him in ejectment.⁵ And a lessee, proceeded against by ejectment, who has received notice from a claimant, disputing his landlord's title, not to pay him any more rent, and has been threatened

¹ *Crofts v. Middleton*, 8 De G. M. & G. 192; 25 L. J. (Ch.) 513. See *Bovill v. Goodier*, L. R. 1 Eq. 35; L. R. 2 Eq. 195. A judgment in ejectment against one employed merely as a clerk in the store of a tenant in possession of land is void and may be enjoined. A district court in Pennsylvania has jurisdiction of a bill in equity for an injunction on the part of a complainant in possession under an equitable title, filed against the holder of a legal title, for the purpose of preventing a sale or conveyance, of quieting possession, declaring them trustees in equity, and of obtaining a conveyance. *O'Neill v. Hamilton*, 44 Pa. St. 18.

² *Farley v. Woodburn*, 10 N. J. Eq. (2 Stock.) 96.

³ *Kerlin v. West*, 15 N. J. L. (3 Green) 448.

⁴ *State v. Reed*, 4 Har. & M. (Md.) 6.

⁵ *Beckham v. Newton*, 21 Ga. 187; *Porrett v. Barnes*, 2 L. J. (Ch.) 142.

with distress by the landlord if he does pay rent, cannot restrain either the ejectment by the claimant or the distress by his landlord.¹ But restraint of mortgagees attempting the exercise of their powers inequitably, is a well-established branch of equitable jurisdiction;² and where there has been a waiver by the mortgagee of a default on the part of the mortgagor, equity will restrain ejectment by the former.³ On the same principle a surviving partner, proceeding by ejectment to obtain possession of a farm, of which a joint lease had been made to himself and his deceased partner, will be restrained by injunction.⁴ And an injunction will be granted against the ejectment under a deed of appointment, if a husband obtain such from his wife by undue influence and oppression, and an issue will be directed.⁵

§ 192. **Same — Modified and Temporary Relief.** — In ejectment cases, where no discovery is sought, and the title at law is admitted, an injunction will be granted upon terms only, so as to leave the party to proceed to trial and judgment at law.⁶ And where the object of an equity suit brought to restrain an action of ejectment is not to deprive the plaintiff in ejectment of his legal title altogether, or to prevent him from using it to recover the land, but merely to impose a pecuniary charge on the land, which the plaintiff ought to pay before he enters on the land under his judgment, the preliminary injunction ought not to restrain and impede the trial of the ejectment suit, but only restrain the execution of the judgment until the matters of equity may be investigated and decided.⁷

§ 193. **Between Tenants in Common.** — Equity protects the right and title of tenants in common in and to the common property. Thus, after there has been a judgment at law, at the

¹ *Homan v. Moore*, 4 Price, 5.

² *Infra*, § 455.

³ *Langridge v. Payne*, 2 J. & H. 423. In this case an agreement had been entered into, in writing, not to call in a mortgage for two years, the mortgagor fulfilling his covenants. On one occasion within the two years interest was not paid on the day, and the mortgagee shortly afterwards, after giving notice that he was no longer bound by the agreement, demanded and received payment of the interest and incidental costs. Upon the mortgagee bringing ejectment within the two years the court granted an injunction.

⁴ *Elliott v. Brown*, 3 Sw. 489.

⁵ *Peel v. —*, 16 Ves. 157.

⁶ *Ham v. Schuyler*, 2 Johns. (N. Y.) Ch. 140.

⁷ *Hill v. Billingsly*, 53 Miss. 111.

instance of some tenants in common, for an actual partition of land, the other tenants, or any of them, may have an injunction against the judgment, upon the allegation that the land cannot be actually divided without injury to the owners; and the injunction will be continued until the hearing, that the court may decide upon the proofs whether an actual partition, or a sale of the premises, will be most for the interest of the parties.¹ And there was held to be an equitable claim to relief by injunction in a bill which showed that the original parties actually held and possessed as tenants in common, and that the complainants had made valuable improvements.² But only under extraordinary circumstances will the court restrain one joint devisee of land from entering thereon, at the suit of another joint devisee.³

§ 194. **Fraudulent Transfer — Cloud on Title.** — When a conveyance is void as against a subsequent purchaser, on account of fraud, he is entitled to file a bill to enjoin an action brought by the fraudulent grantee, against the purchaser's grantee, under a warranty deed (who has given the purchaser notice to defend the action), and thus to have the validity of the prior deed determined.⁴ So where A. obtained from B. a deed of land, through fraud, in which C. was concerned, and afterwards confessed a judgment to C., who assigned it to D. for a valuable consideration, without notice of the fraud, it was held that the judgment created no valid lien upon the land, and that a conveyance to B. of the land must be decreed, discharged of the judgment, and a perpetual injunction awarded against its execution upon the land.⁵ But a stranger to a title, although in possession, cannot set up that it was obtained in a fraudulent and illegal manner by the owner thereof, and thereupon have such owner enjoined from enforcing his title, when the parties defrauded are satisfied to let the contract stand. The doctrine of equitable estoppel does not apply in such case.⁶

¹ *Gash v. Ledbetter*, 6 Ired. (N. C.) Eq. 183.

² *Jackson v. Jones*, 25 Ga. 93.

³ *Baldwin v. Darst*, 3 Grat. (Va.) 132.

⁴ *Gardner v. Cole*, 21 Iowa, 205.

⁵ *Livingston v. Hubbs*, 2 Johns. (N. Y.) Ch. 512. See also *Jones v. Buxton*, (N. C.) 28 S. E. 545.

⁶ *Treadwell v. Payne*, 15 Cal. 496.

ALLEGATIONS. — In a suit to set aside, on the ground of alleged irregularity, proceedings in progress, which may affect the title to property, the complainant must point out and establish the defects upon which he claims to

§ 195. **Same — Pendente lite.** — In case of an apprehended transfer of real estate by defendant which the complainant seeks to prevent, an injunction will ordinarily be refused when the effect of filing the bill which operates as *lis pendens* is to afford sufficient protection against transfer of the property *pendente lite*. And it may be stated generally that equity will not entertain a suit to prevent a cloud upon title to land, unless there is a determination on the part of the defendant to create the cloud, and the danger thereof is not speculative, but real.¹ Where a bill was filed to obtain the surrender and delivery of a deed and to restrain the defendant from disposing of the land, it not being shown that defendant was insolvent, and the fraud charged in the bill being denied by the answer and affidavits, and the only danger feared being that the defendant might sell the land and thus make the purchaser a necessary party to the litigation, an injunction was refused, the court considering that the doctrine of *lis pendens* afforded sufficient protection in such a case against a purchaser *pendente lite*.² Nor should an injunction be granted pending litigation pertaining to the title to real estate, where the effect of granting it will be to give the complainant an unfair advantage in the action at law.³

§ 196. **Sale of Homestead.** — The protective powers of courts of equity are freely exercised to prevent enforced sales, under an execution, of premises occupied by debtors as homesteads, under the statutes exempting property for the use of families.⁴ And where a valid homestead is about to be levied on and sold, an injunction will be granted to prevent a cloud from being cast on the title; for though the sale would be void, under the statute, yet, as the judgment and execution are valid, the invalidity of the have the proceedings set aside; otherwise the court will leave him to his remedy at law. Proceedings instituted under authority of law will not be arrested upon a mere suggestion, or general allegation of illegality or irregularity, nor will a corporation be required upon such general allegations to show the regularity of its proceedings. *Williams v. Detroit*, 2 Mich. 560.

¹ See *Weed v. Roberts*, 49 N. Y. S. 366; 22 Misc. Rep. 46.

² *Smith v. Malcolm*, 48 Ga. 343. See also *Sage v. City of Gloversville*, 60 N. Y. S. 791.

³ *Northern Pac. R. Co. v. City of Spokane*, (C. C.) 52 F. 428. Compare *Craig v. Lambert*, 11 So. 464; 44 La. An. 885.

⁴ *Colley v. Duncan*, 47 Ga. 668; *Moore v. Granger*, 30 Ark. 574; *White v. Givens*, 29 La. An. 571; *Judd v. Hatch*, 31 Iowa, 491; *Loeb v. McMahon*, 89 Ill. 487; *Lewton v. Hower*, 18 Fla. 872; *Johnson v. Griffin, etc. Co.*, 55 Ga. 691; *Irwin v. Lewis*, 50 Miss. 363; *Tucker v. Kenniston*, 47 N. H. 267.

sale could only be shown by extrinsic evidence, in ejectment for the land, by the purchaser under execution.¹ And such protection is for the same reason extended to the purchaser of a homestead from the head of a family.² But if by statute an ample remedy at law is given for the protection of the homestead and prevention of forced sale, equity will not interfere.³

§ 197. **Void Execution Sale — Cloud on Title.** — There will be found an irreconcilable conflict of authority on one phase of the subject of enjoining the sale of one's land under an execution issued on a judgment rendered against an entirely different person. The real divergence turns on the question whether such sale casts any cloud upon the title of the owner of the land; for there can be no well-founded contention on the fundamental equitable principle that such owner should be protected from so serious an injury as would result from having his title obscured, or at least made apparently doubtful, upon casual inspection, and the salability of his property thus diminished, by a proceeding between strangers, in a matter in which he has no interest.⁴ Therefore the real controversy is on a mixed question of law and fact, namely, whether such sale really casts a cloud upon the owner's title. It is on one side or the other of this question that the authorities are to be ranged. But the clear weight of authority sustains the position that where the owner's record title is perfect, and there are present no unusual circumstances or relations between the parties, such cases present no occasion for equitable interference, legal remedies being considered entirely adequate.⁵

¹ *Roth v. Insley*, 86 Cal. 134; 24 P. 853. A bill in equity which prays that the sale of land on execution may be enjoined, on the ground that the land is held as a homestead, should state that the value of the land does not exceed the amount to which a homestead is limited. *Marriner v. Smith*, 27 Cal. 649.

² *Ketchin v. McCarley*, (S. C.) 11 S. E. 1099.

³ *Henderson v. Rainbow*, 76 Iowa, 320; 41 N. W. 29. In this case it was held that, as under Code of Iowa, section 1994, the homestead must embrace the house used by the owner as a home, and by section 1995, it need not be limited to one subdivision of land, the homestead must be selected and marked out both on plaintiff's land and the land of his wife, and by pursuing these proceedings he has an adequate remedy at law, and an injunction would not lie.

⁴ *Pixley v. Huggins*, 15 Cal. 127; *Christie v. Hale*, 46 Ill. 117; *Sharpe v. Tatnall*, 5 Del. Ch. 802; *Vogler v. Montgomery*, 54 Mo. 578.

⁵ In the following cases it was held that, in the absence of fraud or gross

§ 198. **Circumstances justifying Interference.** — An examination of the authorities will disclose the fact that this class of cases is dealt with by the courts which range themselves on the side of the majority under the original heads of equity jurisdiction, and not otherwise; that is to say, in the absence of proof of fraud, accident, or mistake, or of an equitable title not available in an action of ejectment, or action of trespass to try title, parties are left to their legal remedies and defences. Thus, relief was refused where the execution debtor had levied upon the grantor's

injustice, and irremediable injury, courts of equity will not entertain jurisdiction in restraint of judicial sales of real estate under execution against third parties having no title to the property sold. *Wilcox v. Walker*, 94 Mo. 88; 7 S. W. 115; *Mann v. Wallis*, 75 Tex. 611; *Freeman v. Elmendorf*, 3 Halst. (N. J.) 655; *Swayze v. Hackettstown Nat. Bk.*, 44 N. J. Eq. 9; 13 A. 670; *Bach v. Goodrich*, 9 Rob. (La.) 391; *Coughron v. Swift*, 18 Ill. 414; *Budd v. Long*, 13 Fla. 288; *Shalley v. Spillman*, 19 Fla. 500; *Barnes v. Mayo*, Id. 542; *Bouldin v. Alexander*, 7 T. B. Mon. (Ky.) 425; *McCulloch v. Hollingsworth*, 27 Ind. 115; *Wilson v. Hyatt*, 4 S. Car. 369; *Watkins v. Logan*, 3 B. Mon. (Ky.) 21; *Downing v. Mason*, 43 Ala. 266; *Hall v. Davis*, 5 J. J. Marsh. (Ky.) 290; *Brummel v. Hurt*, 3 J. J. Marsh. 709; *Carlin v. Hudson*, 12 Tex. 202; *Whitman v. Willis*, 51 Tex. 421; *Treadwell v. Payne*, 15 Cal. 496; *Sanchez v. Camaja*, 31 Cal. 170; *Gutierrez v. Pino*, 1 New Mex. 392. The owner of land in possession under a clear title is not entitled to an injunction to restrain a sheriff from executing a writ of restitution issued on a judgment against third parties, to which judgment the complainant is a stranger. In such a case, the whole proceeding being a nullity, and totally ineffective as respects him, no cloud is cast upon his title, and hence there is no necessity for the relief. *Tavis v. Ellis*, 25 Cal. 515. See also *Sebring v. Joanna Heights Ass'n*, (Pa. Com. Pl.) 2 Pa. Dist. R. 629.

CONFLICTING CLAIMS — STATUTORY REMEDY. — Where a bill is filed under Revision N. J. 1189, "to compel the determination of claims to real estate in certain cases, and to quiet the title to the same," an allegation that defendant, by virtue of a judgment and execution at law against complainant's grantor, has seized on and is about to sell lands to which complainant has the legal title, presents no equitable ground for enjoining such sale. *Swayze v. Hackettstown Nat. Bank*, 44 N. J. Eq. 9; 13 A. 670. An injunction was held properly granted under substantially the same circumstances as in the foregoing cases, in *Knightstown Bank v. Deitch*, 83 Ind. 131; *Bishop v. Moorman*, 98 Ind. 1; s. c. 49 Am. Rep. 731; *England v. Lewis*, 25 Cal. 337; *Wilhelm v. Woodcock*, 11 Or. 518; 5 P. 202; *Key City, etc. Co. v. Munsell*, 19 Iowa, 305. In *Osborn v. Taylor*, 5 Paige (N. Y.), 515, a bill to restrain the defendant from selling the plaintiff's farm, on execution against a third person, contained allegations from which it appears that the land was not bound by the judgment. It was held, that a preliminary injunction would be granted; but that the commencement of the suit for an injunction, and filing of the suit, in the county where the land lay, were sufficient notice to the purchaser on execution to entitle the plaintiff to a decree, at the final hearing, that the sale on execution was void.

interest, because upon the evidence the court construed his conveyance to be in effect a mortgage, and held that the execution creditor had a legal right to sell the equity of redemption.¹ On the same principle, an injunction to restrain a levy of execution on a contingent remainder in land should not be granted.² So where a purchaser of land did not allege, in his bill to enjoin its sale, under judgments against a former owner, that his (the purchaser's) grantor was misled by the judgments appearing satisfied of record, and it appeared that he had not yet paid the purchase-money and could recoup the amount of the judgments from it, and so be uninjured, he was denied an injunction.³ But where prior judgments have been paid, and yet the holder threatens to collect them by levying on the debtor's land, the holder of a junior judgment is entitled to have this cloud on the title removed, and to an injunction to stay proceedings on the prior judgments.⁴ And one having an unrecorded equitable interest in land, the legal title to which is in another as trustee, may maintain a bill in equity to restrain an execution sale thereof by a creditor of the trustee.⁵ Nor does the principle upon which relief is refused in this class of cases, apply where a present irreparable injury is threatened as a result of proceedings which are, so far as complainant is concerned, entirely irregular and void; and a person in the quiet possession of real estate as owner may obtain an injunction to restrain others from dispossessing him by means of process growing out of litigation to which he was not a party.⁶ And as a sale of property belong-

¹ *Purdy v. Irwin*, 18 Cal. 850. See also *Macovich v. Wemple*, 16 Cal. 104.

² *Bristol v. Hallyburton*, 93 N. C. 384.

³ *Yeates v. Mead*, 65 Miss. 89; 3 So. 651.

⁴ *Shaw v. Dwight*, 16 Barb. (N. Y.) 536.

SALE UNDER SATISFIED JUDGMENT ENJOINED. — An insolvent gave to his sureties in a guardian's bond a note for the amount of a deficiency in his guardian's account. They sued the note, and obtained judgment and execution, which was satisfied in part by levy upon real estate which was set off to them jointly. B having paid the deficiency in the guardian's account, and having continued in possession of the whole estate in person, or by his grantee, it was held, that he was entitled to an injunction against the executors of his co-surety, to restrain them from selling their testator's legal estate in the premises, unless they shall have accounted with B. on such terms as the court may direct. *Brooks v. Fowle*, 14 N. H. 248.

⁵ *South Presbyterian Church v. Hintze*, 5 Mo. App. 578.

⁶ *Goodnough v. Sheppard*, 28 Ill. 81. See also *Kirwan v. Murphy*, 83 F. 275; 28 C. C. A. 348; *Smith v. Reynolds*, 9 App. D. C. 261; *supra*, §§ 197, 198.

ing to an insolvent's estate, on foreclosure of a mechanic's lien, would constitute a cloud on the title of the estate, in the hands of the assignee, and because he, as such, was not a party to the suit, it was held that the assignee could maintain an action to restrain such sale.¹

§ 199. **Same — Sale of Lands of Married Woman for Judgment Debt of Husband.** — A married woman is entitled, as a preventive against a cloud upon her title, to an injunction to restrain a sheriff from selling, under an execution in which her husband is the debtor, property which she by clear and decisive proof establishes to be her separate property, because she would be compelled to show, in an action of ejectment, by proof outside of the deed, that such property was her separate property, in order to defeat a recovery.² And the protection of a court of equity will be extended to real estate in which a married woman has the equitable title, though the legal title stands in the husband's name, as where the property was bought by him *bona fide* for her and paid for with her money;³ also where she holds an equitable title to only a half interest though the title is outstanding in a third party as her trustee, her husband owning the equitable title to the other half interest.⁴ But where the wife separated in property from her husband by a judgment of the court, enjoins a seizure under a *fi. fa.* against her husband, on the ground that

¹ *Quinby v. Slipper*, 35 P. 116; 7 Wash. 475.

² *Tibbetts v. Fore*, 70 Cal. 242; 11 P. 648; *Appeal of Walker*, 112 Pa. 579; 4 A. 13. In the last case it was held that in Pennsylvania a court of equity will not restrain, by injunction, a creditor from levying on land in which he avers his creditor is interested, though a sale of the wife's land by the husband's creditor may be enjoined, where the wife's title is clear, under the act of 1850, which declares that the property of a married woman shall not be liable to levy and execution for the debts of her husband. *Contra*, *Frazier v. White*, 49 Md. 1.

³ *Cass v. Demarest*, 37 N. J. Eq. 393; *Fairchild v. Knight*, 18 Fla. 770.

ALLEGATIONS. — The statements in the bill by a wife against the judgment creditors of the husband, that property levied upon by them as the husband's was property purchased by her own means, and that she always was, and still is, the owner thereof, sufficiently set out a separate property in her; and while, according to the rule prevailing in Florida, she is to be held to full and strict proof of a separate property, the chancellor should in such case grant an injunction. *Fairchild v. Knight*, 18 Fla. 770. An injunction prayed by a wife to temporarily restrain the sale of her husband's land, on the ground that she was the holder of the *fi. fa.* and was unable to bid, etc., — *held*, properly granted. *Thomas v. Wilkinson*, 65 Ga. 405.

⁴ *Cadwell v. Lawler*, 70 Ala. 293.

she is the owner of the property seized, she must establish her ownership with legal certainty, otherwise the injunction will be dissolved with damages.¹

§ 200. **Restraining Execution of Deed under fraudulent and void Tax Sale.** — Equity will restrain the execution and delivery of a deed upon the sale of land as for a delinquent tax, where there was no valid assessment, without requiring other proof of injury to the plaintiff from the pretended tax;² also where the sale was the result of a combination between the collector and the principal bidders, to prevent competition;³ also where the sale is for a greater sum than that authorized by law.⁴ And where the statute makes a tax-deed conclusive evidence that the sale was regular and presumptive evidence of the regularity of antecedent steps, and the assessment in fact was void because made to the non-resident owner instead of to the occupant, such owner may invoke the jurisdiction of equity to remove the cloud on his title caused by the deed. Nor is it any answer to such suit to say that the time for redemption had not expired. One is not bound to redeem where the assessment was void.⁵ But it is *dicta* that if the illegality of the tax appears upon the face of the proceedings no cloud is cast upon the title, and that in such case no injunction would be proper.⁶

§ 201. **Relief on Ground of Accident.** — Relief by injunction against a sale of property on the ground of unavoidable accident may be obtained where it is shown that without it great injury would result to complainant. Thus, where a conveyance was executed and delivered, and the purchase-price paid, but the conveyance was lost before being recorded, a sale of the land by the

¹ Goldsmith v. Michel, 19 La. An. 272.

² Marsh v. Supervisors of Clark, 42 Wis. 502; Schettler v. Fort Howard, 43 Wis. 48; Stewart v. Crysler, 100 N. Y. 378; 3 N. E. 471; Northern Pac. R. Co. v. Carland, 5 Mont. 146; 3 P. 134; Axtell v. Gerlach, 67 Cal. 483; 8 P. 34.

TEMPORARY RELIEF. — Where the purchaser at a sale for an invalid street assessment tax will become entitled to a deed if plaintiff does not redeem from the assessment within a specified time, it is proper to grant an injunction against the execution of the deed as incidental to an action for the annulment of the invalid assessment and the cancellation of the certificate of sale. Kittle v. Bellegarde, 86 Cal. 556; 25 P. 55; Same v. McMullen, Id. 58.

³ Gage v. Graham, 57 Ill. 144.

⁴ Axtell v. Gerlach, 67 Cal. 483; 8 P. 34.

⁵ Stewart v. Crysler, 100 N. Y. 378; 3 N. E. 471.

⁶ Northern Pacific R. Co. v. Carland, 5 Mont. 146; 3 P. 134.

heirs and representatives of the grantors was enjoined.¹ So a purchaser of real estate located in another state had paid part of the purchase-money, and received from the grantors a deed which was so defectively acknowledged as not to entitle it to record in the state where the land was located, was granted an injunction restraining the grantors from selling the land to others.² But an injunction will not be granted to stay a suit at law for breach of warranty of seizin, upon the ground of the loss of an unrecorded deed, where it does not appear that such loss will endanger the complainant's defence to the suit at law.³

II. TO PROTECT POSSESSORY RIGHTS.

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| <p>§ 202. Narrow Limits of the Jurisdiction.
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§ 202. **Narrow Limits of the Jurisdiction.** — It is only in extreme cases that courts of equity interfere for the protection of possessory rights to real property. From the earliest establishment of equity as a system of jurisprudence, there has been a reluctance to interfere, especially by the extraordinary remedy of injunction, in questions affecting possession.⁴ The main obstacle to the jurisdiction is the peculiar fitness of a legal forum for determining such controversies. While this rigid policy of non-interference has been in modern times somewhat relaxed, its exercise is still guarded and kept within well-recognized bounds, and administered with a careful regard to fixed and settled principles.

¹ Wright's Heirs v. Christy's Heirs, 39 Mo. 125.

² Frank v. Peyton, 82 Ky. 150.

³ Rodgers v. Cross, 8 Chand. (Wis.) 34.

⁴ Lady Paine's Case, 1 Vern. 156.

§ 203. **General Principles.** — In a proper case a preliminary injunction can issue to maintain a party in possession, but not to oust one in possession.¹ Thus, parties claiming to be trustees of a religious corporation, and in possession, will be protected by injunction from interference by others also claiming to be trustees.² So in a case presenting grounds for equitable interference, an injunction was granted to protect a purchaser of a cemetery lot in the full enjoyment of the same; and it was considered immaterial whether he had acquired an absolute or a qualified property therein.³ And an injunction may be granted to quiet one in his possession of land, pending proceedings touching his right.⁴ But the granting of an injunction to protect possession can only be justified when necessary to prevent irreparable injury,⁵ a multiplicity of suits,⁶ or vexatious litigation,⁷ unless the relief is ancillary to relief under some original head of equitable jurisdiction. A proper case for interference is presented where it is shown that the damages which would result from the disturbance of complainant's possession are wholly uncertain, as where one railroad company, the grantor of a right of way across another company's land, is forcibly preventing its grantor from using its own property as a freight-yard, as permitted by the contract granting the easement.⁸ In

¹ *New Orleans & North Eastern R. R. Co. v. Mississippi, Terre-aux-Bœufs, etc. R. R. Co.*, 36 La. An. 561. See *Paramore v. Persons*, 57 Ga. 473.

² *Reis v. Rohde*, 34 Hun (N. Y.), 161.

³ *Burke v. Wall*, 29 La. An. 38.

⁴ *Rutherford v. Metcalf*, 5 Hayw. 58. But such injunction may be dissolved at any subsequent term, on motion, supported by a sufficient showing. *Id.* Where, in an action brought under N. Y. Code, 1638, to compel a determination of a claim to property adverse to that of plaintiff, it appeared that defendant was actually interfering with the possession by plaintiff of the premises in controversy, — *held*, that under 608 *et seq.* an injunction might be issued. *Stamm v. Postwick*, 65 How. (N. Y.) Pr. 358.

⁵ Injunction granted against encroachments upon land by making excavations, erecting permanent buildings, and the like. *Chicago, etc. R. Co. v. Porter*, 72 Iowa, 426; *Clayton v. Shoemaker*, 67 Md. 216. See also *Peters v. Hansen*, 55 Mich. 276.

⁶ *Caro v. Pensacola City Co.*, 19 Fla. 766, holding that where a large tract of land is peculiarly situated in being near a growing city, and many persons claim possession and title from the same source, equity will interfere in behalf of those in possession to declare the right and to enforce it by perpetual injunction, without the prior establishment of the right at law, and without proof of threatened irreparable injury, as well as where the title has been established at law, but continued litigation is kept up and threatened.

⁷ *Ibid.*

⁸ *Chicago & W. I. R. Co. v. Lake Shore & M. S. Ry. Co.*, 30 Ill. App. 129;

such cases an action for an injunction may be maintained by the injured party without first establishing his title by action at law.¹

§ 204. **When Legal Remedy a bar to Relief.** — Since, as was just stated, the main ground of interference in aid of possession is the inadequacy of legal remedies to afford proper and full relief, it only remains to consider when a court of equity will refuse relief because of the existence of legal remedies. It is clear, that where the grievance consists in the entire dispossession of complainant by force, and an action for forcible entry and detainer is provided by statute, no case is presented for equitable interference. And this is true although the application is made to a federal court having jurisdiction of the parties; and relief by injunction was refused, where the defendant confessedly intended to regain possession of certain premises by the use of unlawful force, in view of the fact that the state courts furnished abundant means for punishing forcible entries and detainers and breaches of the peace.²

§ 205. **Relative Convenience and Inconvenience to Parties.** — The court will, in passing upon the application, consider the relative probabilities of loss and inconvenience to the parties from granting or refusing the injunction. Thus, where an abutting owner makes no objections to the use of the road for the purpose of laying gas pipes until after the company has laid its main pipes, and expended a great deal of money in its undertaking to supply the citizens of a large city with gas, who consequently have an interest in the success of the enterprise which would be frustrated and the company ruined, if the work were suspended, an injunction against laying the pipes in accordance

see also *Bonaparte v. Camden & Amboy Railroad Company*, 1 Bald. Cir. 231. A bill praying for an injunction and receiver must show absolute necessity therefor in order to the protection of property from an injury for which the subsequent restoration would afford no adequate compensation. *Frostburg Building Association v. Stark*, 47 Md. 338.

¹ *Caro v. Pensacola City Co.*, 19 Fla. 766. *Baron v. Korn*, 127 N. Y. 224; 27 N. E. 804; 51 Hun, 401.

² *Latham v. Northern Pac. R. Co.*, 45 F. 721. See also *Laughlin v. Fariss*, (Okl.) 50 P. 254; *Catholicon Hot Springs Co. v. Ferguson*, (S. D.) 64 N. W. 539; *Hart v. Foundry Co.*, 72 Miss. 809; *Chemical Nat. Bank v. Hart*, Id. 802; *Claridge v. Lavenburg*, 7 Tex. Civ. App. 155. A disseisin is not a case under Mo. Rev. St. 2722, where "an adequate remedy cannot be afforded by an action for damages," and an injunction will not be granted. *Boeckler v. Missouri Pacific Ry. Co.*, 10 Mo. App. 448.

with the license on which the company acted will not be granted, but plaintiff will be left to his remedy at law.¹ And relief will be refused where the damages for violation of a contract under which possession is held are fixed by the contract itself.²

§ 206. **Abuse of Legal Right to Enter.** — An injunction may be granted to restrain a party from abusing a legal right to enter upon real property to the serious injury of the grantee of the right in possession; and on the same principle one having a right to enter upon the premises for a lawful purpose may be protected by injunction from interference in the exercise of such right. Thus, an injunction to restrain lessees of a mine from preventing complainants from entering and inspecting the mine and making explorations and surveys therein, should be granted almost as a matter of course, upon *prima facie* evidence that the defendants have without authority sunk a shaft upon mineral lands of the complainants, adjoining the mine leased by the defendants, and through it mined a large quantity of ore, and that the defendants refuse to permit an inspection to ascertain the extent of the injury. Under such circumstances a court may, in its discretion, grant an injunction without notice.³ But to warrant an injunction in such cases, not only the serious nature of the threatened injury, but the existence of an intention on the part of the defendant to interfere with and prevent the exercise of the right, should be clearly shown. An allegation in a bill of a right to remove certain buildings from premises which have become forfeited to the respondents, but without stating that the complainant has attempted such removal and been prevented or obstructed in it, does not show a sufficient reason for the intervention of equity between the parties.⁴

¹ Kincaid v. Indianapolis Natural Gas Co., 124 Ind. 577; 24 N. E. 1066. See also Chartiers Block Coal Co. v. Mellon, (Pa. Sup.) 25 A. 597, 152 Pa. St. 286; Lynch v. Union Inst. for Savings, (Mass.) 33 N. E. 603.

² Sheets v. Selden, 7 Wall. 416. In this case a lease of a water-power provided plainly and with a specification of rates for an abatement of rent for failure of water. It was held the tenant could not, by bill to enjoin a writ of possession issued after recovery at law for forfeiture for non-payment of rent, set up a claim for repairs rendered necessary by the lessor's gross negligence, his remedy being determined by the contract.

³ Thomas Iron Co. v. Allentown Min. Co., 28 N. J. Eq. 77; Pratt v. Roseland Ry. Co., (N. J. Ch.) 24 A. 1027.

⁴ Wilcoxon v. Harris, 32 Ga. 480. See also White v. Williamson, (Ga.) 17 S. E. 604.

§ 207. **Of the Possessory Title to be protected.** — An injunction will not issue where the right, to protect which the injunction is claimed, depends upon a doubtful and disputed question of law.¹ Accordingly where a canal company filed their bill in equity to restrain the defendants from occupying land, alleged to belong to complainants, for their canal and embankment, it was held that the injunction must be denied, on the ground that the title to the premises was in dispute and open to reasonable doubt, and that for the injury complained of an adequate remedy at law existed.² The interest of a widow before dower is assigned may however be protected by injunction against injuries to the land in which she might have an estate in dower.³

§ 208. **Actual Interest must be shown.** — But generally before a party can invoke the extraordinary remedy by injunction against another in a matter pertaining to the possession of real property, he must show that he has an actual and a present interest to protect in addition to showing otherwise a proper case for interference. Thus, where a statute gave a special remedy by injunction to the owner of land taken by a railroad company, this was held not to authorize the assignee of a judgment of the county commissioners, recovered in favor of the owners of the land against a railroad company, for land damages, to maintain a bill for an injunction against the use or occupation of the land taken, and in which the complainant had no other interest.⁴ And

¹ *Muir v. Howell*, 37 N. J. Eq. 39; *Fredericks v. Huber*, (Pa. Sup.) 37 A. 90; 180 Pa. St. 572. Where the boundary line is in dispute, an injunction to restrain the defendants from entering upon a "disputed strip of ground" upon which there is a mine, will not lie as an original and independent suit to try the title to the disputed ground, held and possessed by the defendants under claim of right and color of title. *Smith v. Jamison*, 91 Mo. 13; 3 S. W. 212. Homestead possession protected. *Cox v. Garrett*, (Okl.) 54 P. 546. Tenancy in common protected. *Red Mountain Consol. Min. Co. v. Essler*, (Mont.) 44 P. 523. Possession of vendee under contract to convey held entitled to protection. *Kyle v. Rhodes*, (Miss.) 15 So. 40. See also *South & North Ala. R. Co. v. Alabama G. S. R. Co.*, (Ala.) 14 So. 747.

² *Morris Canal, etc. Co. v. Fagin*, 22 N. J. Eq. 430.

³ *Shepard v. Manhattan Ry. Co.*, 5 N. Y. S. 189. Where a wife is given a life-estate by will she is entitled to possession, and her grantee has a right to protection by injunction against the unlawful interference with such possession. *Nicholson v. Drennan*, (S. C.) 14 S. E. 719.

⁴ *Illsley v. Portland, etc. R. R. Co.*, 56 Me. 531; Rev. Stat. Me. ch. 51, § 9. On a bill to enjoin an execution against particular property, the allegation that a prior execution in favor of another plaintiff against a part of the same defendants had been enjoined, is not ground for equitable relief, it not

in another case it was held that to obtain an injunction against miners for disturbing the plaintiff's orchard and crops, he must show that he had appropriated the land before the mining claim was located.¹

§ 209. **Title of Pre-emptor sufficient.** — The inchoate title of one who has taken the preliminary steps to acquire title under the public land laws of the United States has such legal interest in the lands claimed by him as to entitle him to equitable protection in the enjoyment and possession of the same.² And where defendant entered as a homestead certain land in the possession of the widow and children of a decedent, who had filed his declaratory statement under the pre-emption laws, and paid the register's and receiver's fees, and the question of title was pending before the Secretary of the Interior, it was held that while a contest to determine title was not within the jurisdiction of the courts, yet they would grant a temporary injunction, restraining the disturbance of the person so far in rightful possession.³

§ 210. **Right must be distinct from that of Public.** — A right enjoyed in common with the people generally is not enough to sustain a bill for injunction; the complainant must show some

appearing but that the ground for the prior injunction had reference to the judgment or process itself, and not to the property. *Dunn v. Bank of Mobile*, 2 Ala. 152. See also *Maillon v. Lynch*, 15 La. An. 547.

¹ *Ensminger v. McIntire*, 23 Cal. 593.

² *Jackson v. Jackson*, 17 Or. 110; 19 P. 847. See *Barnes v. Newton*, (Okl.) 48 P. 190; *Noble v. Union River Logging R. Co.*, 13 S. Ct. 271; 147 U. S. 165; *La Chapelle v. Bubb*, (C. C.) 69 F. 481. In this case plaintiff alleged the filing of his declaratory statement, claiming to pre-empt two subdivisions of land under the laws of the United States; that he was a legally qualified pre-emptor under said laws; that he had been in the peaceable possession thereof, complying with the requirements of said laws, in doing all necessary acts of residence and cultivation; that the defendant unlawfully and wrongfully took possession of one of the subdivisions, and prevented and forcibly resisted the plaintiff from taking possession thereof; that the defendant forcibly resists plaintiff's taking possession of the land in order to do the necessary acts of residence and cultivation thereon; and that the defendant was wholly insolvent. *Held*, sufficient to constitute a cause of suit for an injunction to compel the defendant to desist from doing such acts, and to admit the plaintiff into the possession of the land; that the filing of the declaratory statement by the plaintiff entitled him to the possession of the land for the purpose of performing those acts required to be done by the pre-emption law; and that no other person had a right to enter the land or to interfere with the plaintiff's occupancy of it, so long as his entry remained uncanceled.

³ *Wood v. Murray*, (Iowa), 52 N. W. 856. Loss of right of pre-emptor to injunction by laches. See *Proctor v. Stuart*, (Okl.) 46 P. 501.

distinct right. Thus, the mere right, common to all inhabitants, of allowing cattle to range for pasture in the open woods, will not enable a complainant to obtain an injunction restraining defendants from burning the woodland.¹ And a preliminary injunction, issued to restrain the defendants from in any wise interfering with land claimed by the bill to have been dedicated to public use, may be continued to the hearing where the defendant shows no title to the property from any one in possession, nor under those in whom the title was previously vested.²

§ 211. **Equitable Right protected.** — A party, by whose encouragement expenditures have been made to such an extent that they are not capable of reimbursement, except by enjoyment, will be enjoined from disturbing the possession.³ But equity will not restrain a party in possession of property purchased from a person in peaceable possession, who bought it at a sheriff's sale, from the use and enjoyment of the property during the pendency of a suit by an adverse claimant, where both parties were ignorant, when they bought, of any adverse title to that of the vendors.⁴

§ 212. **Right of State in Public Lands.** — Various important questions affecting the right of a state to have its peaceable possession of the public lands belonging to it protected by injunction, were decided by the supreme court of Texas in a comparatively recent case. It was held among other propositions that the Texas statutes which provide for the action of trespass to try title did not constitute ground for refusing an injunction, as affording an adequate legal remedy, since the petition alleged

¹ Harrell v. Hannum, 56 Ga. 508.

² Trustees of School District v. Gray, 27 N.J. Eq. 278. A steamboat company obtained a preliminary injunction restraining defendants, who also ran a line of boats, from using a certain dock, the right to the exclusive use of which the alleged complainant had leased from a railroad company. The answer alleged that the lease was invalid, and showed that the dock was the terminus of the railroad company, and that it maintained its tracks thereon for the purpose of receiving and discharging freight. *Held*, that the answer was responsive to the bill, and warranted dissolution of the injunction, as the railroad company had no right by its lease to prevent the landing of other steamboats at the dock to deliver freight to or receive it from said railroad company. Indian River Steamboat Co. v. East Coast Transp. Co., (Fla.) 10 So. 480.

³ Big Mountain Improvement Company's Appeal, 54 Pa. St. 361 ; Bate v. Keystone Surgical Supply Manuf'g Co., (Pa. Com. Pl.) 3 Lack. Jur. 391.

⁴ Kelly v. Morris, 31 Ga. 54.

inclosure of public lands, and not the erection of inclosures thereon.¹

§ 213. **Prescriptive Right to Possession.** — Clear and satisfactory evidence of peaceable possession and enjoyment for a period of sufficient length to create a presumption of a prior grant will be sufficient to entitle a party's present possession to equitable protection in a proper case. Thus, it was held that although a dedication of a lot to pious uses might be too vague an appointment to be carried into effect in a court of equity, upon general principles, yet if the land had been long occupied for these uses, with the knowledge and consent of the donor, his heirs might be perpetually enjoined from disturbing the possession.² And where a party has acquired an open and unobstructed right of way over land by publicly using the same in that manner, without objection, for more than twenty years, he can enjoin its obstruction.³

§ 214. **Landlord seldom enjoined.** — Only in an extraordinary case, to prevent fraud and irreparable injury, will a landlord be enjoined from pursuing his statutory remedy for recovering the premises and collecting the rent.⁴ But the court will relieve against the consequences of a breach of covenant to repair where the lessee is unable, from circumstances over which he has no

¹ *State v. Goodnight*, 70 Tex. 682; 11 S. W. 119.

THE PETITION alleged that defendant had practically inclosed a large area of the public-school lands, and of the unappropriated public domain; that such inclosures prevented the use of such lands as grazing commons by the people, interfered with the moving of stock, and obstructed travel; that they were unlawful, and impeded sale of the lands, under the laws for that purpose. *Held*, that the petition alleged both a purpresture and a public nuisance, and was not demurrable, as the obstruction to the right to sell the public lands cannot be waived, since Act Tex. Feb. 7, 1884.

² *Kutz v. Beatty*, 2 Cranch C. Ct. 699; 2 Pet. 566. Where land over which a highway has been established by prescription has been fenced in by the owner for more than ten years before the passage of Act Tex. July 4, 1887, which prohibits the acquisition by limitation of law of land over which a street has been established, such owner is entitled to an injunction restraining the reopening of such highway. *Ostrom v. City of San Antonio*, 77 Tex. 345; 14 S. W. 66.

³ *Rogerson v. Shepherd*, 32 W. Va. 807; 10 S. E. 632.

⁴ *Huff v. Markham*, 71 Ga. 555. Under N. Y. Code, § 219, an injunction will not be granted to restrain a landlord from judicial proceedings to recover possession of land leased by him to the plaintiff. *McGune v. Palmer*, 5 Robt. (N. Y.) 607. And see also *Bean v. Pettangell*, 7 Id. 7; 2 Abb. Pr. n. s. 58; *Murry v. James*, 37 How. (N. Y.) Pr. 52; *Seeback v. McDonald*, 11 Abb. (N. Y.) Pr. 95; *Roberts v. Mathews*, 18 Id. 199.

control, to complete the repairs within a specified time.¹ The right of a landlord to dispossess his tenant for breach of covenant is a distinct matter from his interference with the tenant's ordinary possession under the lease, which stands upon the same footing with other possessory rights.² Thus, a gas company which has leased and is using natural gas wells is entitled to an injunction against the lessor, restraining him from interfering therewith, since such interference is likely to result in irreparable injury.³

§ 215. **Nature of Injury warranting Relief.** — A party will not be granted an injunction for protection of a mere possessory right, without clear proof that it is about to be directly dis-

¹ *Bargent v. Thomson*, 4 Giff. 478; 9 Jur. n. s. 1192; 7 L. J. n. s. 365. In this case it appeared that a lease contained a covenant to repair within three months after notice, and if the lessee should not perform the covenant it might be lawful for the lessor to re-enter. On the 16th of September, 1862, the lessee received a notice requiring her to perform within three months certain repairs, and she thereupon directed three persons to execute the works which might be necessary; but two of them were, in consequence of the bad state of the weather, prevented from completing portions of the works by the 16th of December. The lessor's solicitor, on the 20th of December, demanded possession of the premises, on the ground that the lease had been forfeited, and on the 30th of December an ejectment was commenced for a breach of covenant in not completing the repairs before the 16th of December. But on a bill by the lessee showing these circumstances, and that out of the twenty-two items mentioned in the specification sent by the lessors of repairs required only two were not commenced, and eight not completely finished, and that there had been no entry by the lessors to inspect, and no notice from them to expedite the works during the interval, and that the whole of the works was completely finished in the second week in January, the court held that the lessee was entitled to be relieved against an ejectment for the breach of covenant, and granted a perpetual injunction to restrain the action, and directed an inquiry whether the covenants had been performed. See also *Hills v. Rowland*, 4 De G. M. & G. 430; *Coe v. Hobby*, 72 N. Y. 141; *Smith v. Kerr*, 108 N. Y. 31; *McKenzie v. Harrison*, 120 N. Y. 260; *San Reno Hotel Co. v. Brennan*, (Sup.) 19 N. Y. S. 276.

² It seems to remain an open question, so far as judicial decisions go, whether equity will relieve against ejectment where the right of the lessor accrues, not by non-payment of rent, but by non-performance of covenants which may be compensated in damages. *Sheets v. Selden*, 7 Wall. 416.

³ *Citizens' Natural Gas Co. v. Shenango Natural Gas Co.*, (Pa.) 20 A. 947; *Indianapolis Nat. Gas Co. v. Kibby*, (Ind. Sup.) 35 N. E. 392. But the drilling of an oil or gas well through a part of a coal mine from which all the coal has been extracted except what is necessary for the props, does not by its mere physical damage to the mine, or its effect as an obstruction, threaten such an injury to one owning the coal and the right to mine it as will warrant the issuance of a preliminary injunction. *Rend v. Venture Oil Co.*, (Cir. Ct.) 48 F. 248.

turbed;¹ nor when the loss or inconvenience is trivial.² Accordingly it was held that though damages are recoverable, from one who, in building a house, has inserted the ends of the joists into his neighbor's wall without license, yet an injunction against a continuance of the injury will not be granted unless special facts are shown requiring it.³ And where the erection of a building, the thing sought to be restrained, had progressed some way before plaintiff had applied for an injunction, it was held that defendant should not be required, upon a temporary injunction being granted pending the determination of the question of title in an action at law, to remove the part of the building already erected, unless it appeared that the safety of plaintiff's building was endangered.⁴ On the same principle, where the grievance complained of was the obstructing of plaintiff's carriage-road by defendant's building a wall in front of her own lot, though within the limits of the highway, it was held no ground for an injunction, since plaintiff had another road near by equally available, and in daily use.⁵

¹ *Moore v. Hallum*, 1 Lea (Tenn.), 511; *Wagoner v. Wagoner*, (Md.) 26 A. 284.

² *Dickerson v. Jenkins*, (Sup.) 35 N. Y. S. 605; 14 Misc. Rep. 115. See *Robens v. Barrett*, (Sup.) 21 N. Y. S. 124; 66 Hun, 189.

³ *Rankin v. Charless*, 19 Mo. 490. In the absence of wilful injury, or of unnecessary injury or destruction, caused by negligence or unskilfulness, a tenant in common will not, at the instance of his co-tenants, be enjoined from prosecuting the business of mining on their common claim. *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134; 27 P. 863.

⁴ *Clayton v. Shoemaker*, 67 Md. 216; 9 A. 635.

PIPE LINE IN RIVER. — An oil company, without authority, laid a pipe for transporting oil on lands of the state at the bottom of a navigable river, and underneath the drawbridge of a railroad company, which asked for an injunction. The width and depth of the river were so great that the pipe did not interfere with the bridge. *Held*, that the injunction should be refused because (1) the pipe was laid before the injunction asked for; (2) it would not interfere with the operations of the drawbridge, or any lawful work in connection therewith; (3) the land on which the pipe was laid did not belong to the complainant, but to the state; (4) the complainant's franchise is not a monopoly, and does not exclude the defendant from carrying oil, especially its own oil. *United New Jersey R. R., etc. Co. v. Standard Oil Co.*, 38 N. J. Eq. 123.

⁵ *Sargent v. George*, 56 Vt. 627. Injunction refused where a mill-owner sought to restrain the grading of a street on the ground that the grading would endanger freedom of access to his property. but the evidence showed that access to his mill could be restored at a merely nominal expense. *Columbus v. Storey*, 33 Ind. 195.

REMOVAL OF BRIDGE. — Plaintiff's bill prayed an injunction against the

§ 216. **Husband's Possession of Wife's Property.** — The protection of the equitable rights of married women with respect to their separate estate is one of the recognized heads of equity jurisdiction; but it is no abuse of discretion for the court to refuse an interlocutory injunction prohibiting the husband, from whom his wife has separated, from occupying her property, of which he was in possession when she separated from him.¹

§ 217. **Interference with Execution of Writ of Possession.** — After judgment for possession in ejectment, plaintiff may enjoin defendants therein from unlawfully interfering with the execution of the writ of possession.² So, on a sale of mortgaged premises, in a suit to foreclose, if the tenant in possession refuses to deliver up the premises the court will grant an order to the tenant to deliver possession; and in default thereof an injunction will issue.³ But an execution in ejectment between two will not be restrained at the instance of a stranger holding a paramount title, for if his title is good the judgment does not affect him.⁴

§ 218. **No Interference with Legitimate Use of Property.** — In removal of a bridge, part of a highway running through his farm, which lay on both sides of the stream. Defendants showed that a part of the highway, including the bridge in question, had been relocated to avoid railroad crossings, and a new bridge built, which was likewise on plaintiff's farm, and might be used by him by travelling a slightly greater distance, and that the old bridge had been abandoned by the public. *Held*, that, as it had ceased to be a highway, plaintiff was not entitled to an injunction against its removal. *Brockhausen v. Boehland*, (Ill.) 27 N. E. 458.

¹ *Payton v. Payton*, (Ga.) 13 S. E. 127.

² *Hawkins v. McDougal*, 126 Ind. 544; 25 N. E. 820. See *Johnson v. St. Louis, I. M. & S. Ry. Co.*, 12 S. Ct. 124; *St. Louis, I. M. & S. Ry. Co. v. Johnson*, Id. On a bill brought by G. and wife to enjoin an ouster under a writ of possession in ejectment by S., a grantee from H., who held merely a tax-title, having bought the three hundred acres for \$1.67, and who had within two years of the delinquent sale refused a tender of the taxes, interests, and damages (\$25), duly made by the wife, to whom the land had been conveyed three years before the assessment. It was held that the injunction was properly granted. Equity required a conveyance from S. to the wife, and G. had no defence at law. *Sperry v. Gibson*, 3 W. Va. 522.

³ *Ludlow v. Lansing*, Hopk. (N. Y.) 231.

⁴ *Harper v. Hill*, 35 Miss. 363. B. filed a bill stating that C., having been turned out of the possession of certain premises, the complainant was put in upon a year's lease by the landlord, and had since remained in possession, and raised crops still growing, and that he had no knowledge of any rights of C. in the premises, who subsequently got the proceedings by which he was ejected reversed, and obtained an order of restitution, which B. sought to enjoin. It was shown C. was legally entitled to the premises. It was held that B. could not maintain his action. *Boinay v. Coats*, 17 Mich. 411.

considering the propriety of granting or refusing an injunction, in matters pertaining to the uses of property by those in possession, courts should give intelligent attention to the increased and increasing demands of trade and industry. They should in no case grant an injunction where it would have the effect of interfering with the legitimate use and enjoyment of property. The owner of land will not be enjoined from building thereon small tenement houses to let to negroes, at the instance of the owner of land adjoining, which is occupied as a residence by the owner. It is immaterial that defendant is acting through spite in trying to force a sale of the land to him, so long as the use of his land is legitimate and profitable.¹

III. PROTECTION OF EASEMENTS.

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| <p>§ 219. Scope of the Subject.</p> <p>220. Definitions — Establishment of Right at Law.</p> <p>221. Obstructions to Right of Way — General Principles.</p> <p>221 <i>a.</i> Employment of the Remedy to remove Obstructions.</p> <p>222. Special Injury must be shown.</p> <p>222 <i>a.</i> Preventing Unreasonable or Dangerous Use of Right of Way.</p> <p>223. Remedy at Law.</p> <p>224. Right in Dispute.</p> <p>224 <i>a.</i> Character in which Property held, sometimes important.</p> <p>225. Rule in New Jersey.</p> <p>226. Injury to adjacent Way.</p> <p>227. Building, or Railroad in Street.</p> <p>228. Right of Way of Railroad through Canyon.</p> | <p>§ 229. Miscellaneous Encroachments upon Easements of Public Nature — Telegraph and Telephone Poles and Wires.</p> <p>230. Lateral Support — Mining Operations.</p> <p>231. Excavations generally.</p> <p>232. Party Walls.</p> <p>233. Ancient Lights — General View of the Subject.</p> <p>234. Nature of Injury justifying Interference.</p> <p>235. Prescriptive Right no longer recognized.</p> <p>236. Easement Right secured by Contract.</p> <p>237. Reservation in Grant or Lease.</p> |
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§ 219. **Scope of the Subject.** — The protection of easements in the widest sense of that term probably constitutes one of the most important heads of jurisdiction by injunction. In its most extensive sense the term “easement” includes not only all rights which one may acquire either by contract or prescription in or over the land of another, but many of the rights enjoyed in common with the community at large, such as the right to travel on and across roads and waterways, to use and enjoy public parks and build-

¹ Fallon *v.* Schilling, 29 Kan. 292; s. c. 44 Am. Rep. 642. See also Vaughn *v.* Yawn, (Ga.) 29 S. E. 759.

ings, etc. Consequently the subject of injunction to protect easements unavoidably runs into the subject of nuisance, and *vice versa*; and in considering the employment of the remedy to protect water-rights and the rights of riparian owners, a violated right of easement is in nearly every case the basis of the complainant's claim to relief. Any violation of an easement right, if vexatiously persisted in, may constitute a nuisance; but there are many nuisances which do not violate an easement in its strict sense. So the imposition of a new servitude upon a street or public road, without making due compensation, usually deprives the abutting owners of an easement in part or entirely, and as will be seen,¹ entitles such abutters to an injunction.

§ 220. **Definitions — Establishment of Right at Law.** — Thus it is seen that there are many easements of a public character to which there can be no exclusive right, but in which one may acquire and hold an interest, entitled to protection in a court of equity. In its usually accepted and restricted sense, however, an easement is a burden or servitude upon land attached to other land as incident or appurtenant thereto.² The land to which an easement is attached is called the dominant, and that upon which the burden or servitude is laid is called the servient tenement. But courts of equity are reluctant and usually refuse to enjoin disturbances of easements until the right has been established at law.³

¹ *Infra*, §§ 227, 229.

² See Deering's An. Civ. Code, Cal. sec. 804, where the following easements are enumerated: The right of pasture; of fishing; of taking game; of way; of taking water, wood, minerals, and other things; of transacting business upon land; of conducting lawful sports upon land; of receiving air, light, or heat from or over, or discharging the same upon or over land; of receiving water from or discharging the same upon land; of flooding land; of having water flow without diminution or disturbance of any kind; of using a wall as a party-wall; of receiving more than natural support from adjacent land or things affixed thereto; of having the whole of a division fence maintained by a coterminous owner; of having public conveyances stopped; or of stopping the same on land; of a seat in church; of burial. An easement is not to be confounded with a license; the former implies an interest in the land on or over which it is to be enjoyed, while the latter carries no such interest. Washburn on Easements, sec. 5. The above enumeration includes those classes commonly known as easements and *profits à prendre* as well.

³ *Rhea v. Forsyth*, 37 Pa. St. 508; *Hieskell v. Gross*, 3 Brewst. (Pa.) 430; s. c. 7 Phila. (Pa.) 317; *King v. McCully*, 38 Pa. St. 76. On this once important branch of equity see the following English cases: *Cross v. Lewis*, 2 B. & C. 686; *Maguire v. Grattan*, 1 R. 2 Eq. 246; *Daniel v. North*, 11 East, 372; *Straight v. Burn*, L. R. 5 Ch. 163; *Theed v. Debenham*, 2 Ch. D. 165;

§ 221. **Obstructions to Right of Way — General Principles.** — The jurisdiction is based upon the prevention of irreparable injury and avoiding a multiplicity of suits.¹ The commonest form of easement is a right of way, which may consist in the right of private egress and ingress over another's lands, or in the right to enjoy a public road or street in common with the community at large. And it may be stated generally that any permanent or repeated obstruction of a right of way, either public or private, will warrant the granting of an injunction to prevent its continuance, though it should be remembered that an obstruction of a public way, or public place, constitutes a nuisance or purpresture, as may, but not necessarily, the obstruction of a private way.² Injunction lies at the suit of an individual to restrain such an appropriation of the site of a street by another as leaves no mode of access to complainant's premises.³

Potts v. Levy, 2 Drew. 272; *Simper v. Foley*, 2 John & H. 555; *Gale v. Abbott*, 8 Jur. n. s. 987; *Kelk v. Pearson*, L. R. 6 Ch. 809; *Beadel v. Perry*, L. R. 3 Eq. 465; *Martin v. Headon*, L. R. 2 Eq. 425; *Dent v. Auction Mart Co.*, L. R. 2 Eq. 238. The right to equitable relief in England in cases of disturbance of easements is considerably modified by statute 2 and 3 Wm. Ch. 72, sec. 3, which provides as follows: "And be it further enacted that where the access and use of light to and for any dwelling house, workshop, or other building shall have been actually enjoyed for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

¹ *Stallard v. Cushing*, 76 Cal. 472; 18 P. 427; *Karrer v. Berry*, 44 Mich. 391. An injunction will be granted to restrain the doing of that which would destroy or injure an easement. *Schwoever v. Boylston*, 99 Mass. 298; *Jacksonville v. Jacksonville, etc. R. Co.*, 67 Ill. 544; *Seymour v. McDonald*, 4 Sandf. (N. Y.) Ch. 508; *Schermerhorn v. New York*, 3 Edw. (N. Y.) Ch. 119; *Wheeler v. Gilsey*, 35 How. (N. Y.) Pr. 147; *Lawrence v. New York*, 2 Barb. (N. Y.) 581; *Whitney v. Union R. Co.*, 11 Gray (Mass.), 365. Any encroachment upon the quiet enjoyment of an easement, whether created by grant or prescription, will be prevented by injunction. *Northern Pac. R. Co. v. Carland*, 5 Mont. 146; 8 P. 134.

² *White v. Tide Water Oil Co.*, (N. J. Ch.) 25 A. 199; *Haight v. Littlefield*, (Sup.) 24 N. Y. S. 1097; 71 Hun, 285; *Hagar v. Wilson*, (Tenn.) 46 S. W. 1033; *Ellison v. City of Louisville*, (Ky.) 81 S. W. 723; *Pittsburgh & W. E. Pass. Ry. Co. v. Point Bridge Co.*, 30 A. 511; 165 Pa. St. 87; 35 W. N. C. 393; *Moore v. Chicago, R. I. & P. Ry. Co.*, (Kan.) 58 P. 775; *People's Ry. Co. v. Grand Ave. Ry. Co.*, (Mo.) 50 S. W. 829; 149 Mo. 245; *Kansas City & S. E. Ry. Co. v. Kansas City & S. W. Ry. Co.*, (Mo.) 81 S. W. 451; *Lathrop v. Elsner*, 53 N. W. 791; 93 Mich. 599; *Cohen v. L'Engle*, 29 Fla. 579; *Wilkes v. Hunt*, 4 Wash. St. 100.

³ *Pratt v. Lewis*, 39 Mich. 7; *Zearing v. Raber*, 74 Ill. 409. The erection

§ 221 *a*. **Employment of the Remedy to Remove Obstructions.** — Occasionally courts of equity have granted the mandatory power of the remedy herein. Thus where it was found that plaintiff had a right of way over a driveway, and that the defendants had obstructed it by fences, with intent to exclude plaintiff permanently therefrom, that the fences would be removed without any great or disproportionate injury to defendants' property, and that plaintiff had not been guilty of laches, he was entitled to a mandatory injunction for their removal.¹

§ 222. **Special Injury must be shown.** — In a suit to enjoin obstruction of a right of way, the cause of action rests upon the threatened obstruction.² And a preliminary injunction is never granted unless the act threatened to be done will inflict irreparable injury to the complainant. Thus, where the threatened act was the building of a railroad, and for present convenience the complainant had other access to his unimproved lands than by the easement claimed to be obstructed thereby, the imminency of such injury was held not to be sufficiently apparent to warrant an injunction.³ And the fact that by reason of the fences, which caused an alleged obstruction, the snow drifted in the road more than it would otherwise have done, and that this impeded plaintiff's passage over it, does not show any special damage to him, or any other different annoyance or inconvenience from that by a railroad company of bridge abutments upon the sides of an unfrequented country road, which are not presently used or needed for use, but are overgrown with brush and weeds, will not inflict a serious public injury of the character which will induce a court of equity to interfere by preliminary injunction; but it will leave the public to its remedy by indictment to abate the nuisance. *Inhabitants of Raritan v. Port Reading R. Co.*, (N. J. Ch.) 23 A. 127. See *Bank of State of Georgia v. Porter*, 87 Ga. 511; 13 S. E. 650.

¹ *Boland v. St. John*, (Mass.) 89 N. E. 1035.

² *Harding v. Cowgar*, 127 Ind. 245; 26 N. E. 799; *New York, N. H. & H. R. Co. v. Bridgeport Traction Co.*, 82 A. 953; 65 Conn. 410; *Downing v. Dinwiddie*, (Mo. Sup.) 33 S. W. 470; *Woods v. Early*, (Va.) 28 S. E. 374; *Yeatts v. Doyle*, 42 A. 468; 190 Pa. St. 129; *Delaware, L. & W. R. Co. v. Breckenridge*, 43 A. 1097. As to nature of injury warranting injunction, see also *Spring Grove Ave. Co. v. Village of St. Bernard*, (Com. Pl.) 1 Ohio N. P. 85, involving laying pipes in highway, and compare *Inhabitants of Township of Franklin v. Nutley Water Co.*, (N. J. Ch.) 32 A. 381.

³ *Booraem v. North Hudson Co. Ry. Co.*, 44 N. J. Eq. 70; 14 A. 106. See also *Oswald v. Wolf*, 129 Ill. 200; 21 N. E. 839; *Kean v. Asch*, 27 N. J. Eq. 57; *Shaver v. Cohn*, 40 How. (N. Y.) Pr. 129; *Wharton v. Hannon*, (Ala.) 22 So. 287; *Wilkes-Barre & K. Pass. R. Co.*, (Pa. Com. Pl.) 6 Kulp, 503; *Bray v. Ocean City R. Co.*, (N. J. Ch.) 37 A. 604.

where an award of damages would be sufficient remuneration, and there is no allegation that defendant is not responsible for any damages that might be recovered, equity should not interfere.¹ And the court may, in the exercise of its discretion, balance the relative convenience and inconvenience to the parties of granting an injunction or leaving them to settle their rights in a legal forum. Thus, where the owner of a lot brought a suit in equity to have the defendant enjoined from maintaining fences across streets, over which he had a right of way as appurtenant to the lot, and it did not appear that plaintiff would ever have occasion to use the right of way, while the removal of the obstructions would cause the defendant a great deal of trouble and expense, it was held that the plaintiff should be left to his remedy at law.²

§ 224. **Right in Dispute.** — To warrant a decree and an injunction to compel a landowner to keep open a way over his premises for the use of another, the complainant's right should be clear and undoubted. If doubtful, the decree should be withheld until the right is established at law.³ But a somewhat different rule applies where the right claimed to be obstructed is to the use of a public road, alley, or street. Its existence being once admitted or shown, the right to its unobstructed use belongs to all. Still, the right of access to it as between abutting or coterminous landowners presents a private rather than a public question. And to entitle a party to a perpetual injunction to restrain the grading and improving of land as a street, he must show that he is the owner of such land: proof, merely, that he is in possession will

¹ *Welsh v. Taylor*, 50 Hun, 137; 2 N. Y. S. 815; *Haskell v. Denver Tramway Co.*, 46 P. 121; 23 Colo. 60; *Oviatt v. Akron St. R. Co.*, (Com. Pl.) 2 Ohio N. P. 84; 3 Ohio Dec. 252; *Doane v. Lake St. El. R. Co.*, 46 N. E. 520; 165 Ill. 510; 36 L. R. A. 97; *Botsford v. Wallace*, 44 A. 10; 72 Conn. 195; *Redman v. Monongahela Boulevard Co.*, 42 A. 133; 189 Pa. St. 487; *Pennsylvania R. Co. v. Turtle Creek Valley Electric Ry.*, 36 A. 848; 179 Pa. St. 584.

² *Chapin v. Brown*, 15 R. I. 579; 10 A. 639. See also *Dyer v. Cincinnati, P. & V. Ry. Co.*, 7 Ohio Cir. Ct. R. 255.

³ *King v. McCully*, 38 Pa. St. 76. See also *Fritz v. Erie City Pass. Ry. Co.*, (Pa. Sup.) 26 A. 653; 155 Pa. St. 472; *Lebanon & M. St. Ry. Co. v. Receivers, etc. of Philadelphia & R. R. Co.*, (Pa. Com. Pl.) 2 Pa. Dist. R. 835; *General Electric Ry. Co. v. Chicago City Ry. Co.*, 66 Ill. App. 362; *Kanawha, G. J. & E. R. Co. v. Glen Jean, L. L. & D. W. R. Co.*, (W. Va.) 30 S. E. 86; *Delaware, L. & W. R. Co. v. Breckenridge*, 55 N. J. Eq. 141; *Ocean City R. Co. v. Bray*, Id. 101; *McGregor v. Mining Co.*, 14 Utah, 47. Compare *Murphy v. Railway Co.*, 99 Ga. 207.

not be sufficient.¹ Where a complainant alleged, and the evidence showed, that defendant had erected a gate across the entrance to an alley for the purpose of excluding persons not using it with his permission, the court interfered to remove the gate, and considered it immaterial that plaintiff might open the gate himself, so long as his right to use the alley was disputed and resisted by defendant.² But where it appeared that the statutory proceedings to establish a highway were defective, although a highway had been created by prescription, and that plaintiff had built his fence along each side of the beaten track, where it passed through his farm, in the absence of any evidence that the road had any other boundary lines than those defined by the driveway, or that defendant's fence complained of as an encroachment was not built wholly on his own land outside of said highway, an injunction was held improperly awarded.³

¹ *Gleason v. Village of Jefferson*, 78 Ill. 399.

² *Welsh v. Taylor*, 50 Hun, 137; 2 N. Y. S. 815. On application for injunction, plaintiffs alleged that defendant was about to close an alley, and thereby deprive them of a valuable easement to their property. Defendant answered that the alleged alley was her private property, was closed at the time of plaintiffs' purchases, and that they bought with a full knowledge of these facts. The answer was supported by corroborating affidavits. It was held that the judge did not abuse his discretion in granting a temporary injunction until the case could be heard. *Hughes v. McIntosh*, 83 Ga. 431; 9 S. E. 1110.

OBSTRUCTING STREET. — A lot-owner, claiming under a deed from the original owner of the plat, describing the lot by metes and bounds along a designated street, and who has made valuable improvements thereon, may bring a bill to restrain one who claims title to the whole street from so obstructing the same as to interfere with such owner's rights therein, though such street may never have been opened to the public. *Appeal of Ferguson*, 117 Pa. 426; 11 A. 885.

³ *Wakeman v. Wilbur*, 4 N. Y. S. 938.

CONSTRUCTION OF RAILROAD AND ELEVATOR. — In a suit to enjoin defendants from interfering with the construction by plaintiff of a railroad, the petition alleged that plaintiff was the owner of land on which it proposed to build it, and had commenced building a large elevator, and had contracted for a large amount of machinery, and gone to great expense, and that the road was necessary for carrying out the enterprise, and was located entirely on its own land. Defendants claimed title to part of the land over which the road ran, and the evidence left the question of title in doubt. It appeared that the enterprise was important, and ought to be encouraged; that delay would injure and hinder it; and that the construction of the road could not seriously injure defendants. *Held*, that an injunction should be granted, and defendants be left to their remedy on plaintiff's bond. *Roanoke Nav. Co. v. Emery*, 108 N. C. 130; 12 S. E. 900.

§ 224 *a.* — **Character of Use for which Property held sometimes Important.** — It may often happen that what would not be an obstruction warranting relief, as a general rule, is such in the particular instance, owing to the character in which the property is held and the use made of it. Thus, it was held that a steam-railroad company has such a substantial property interest in its right of way, as well as in land which it holds in fee, as to entitle it to an injunction against a street-railway company which threatens to span such property with a viaduct for the transportation of electric cars over complainant's tracks without authority.¹

§ 225. **Rule in New Jersey.** — It is held in New Jersey, contrary to the generally prevailing rule, and in analogy to the early rule governing the granting of injunctions to protect private interests in real property, that equity will not interfere by mandatory injunction commanding the removal of an obstruction from land and allow complainant to pass over it, where complainant claims a purely legal interest in the land, which interest has not been established at law.²

§ 226. **Injury to Adjacent Way.** — Abutting lot-owners upon streets and alleys in cities and towns have such interests in, and rights to use, such streets and alleys as warrant courts of equity in granting injunctions for the prevention not only of obstructions but such other injuries as lessen the enjoyment of the same. Thus, the purchaser of an inside lot in a city, where the lots are laid out with an established frontage, is entitled to an injunction against the owner of a corner, who so changes his frontage as to make his out-buildings interfere with such purchaser's enjoyment of his lot.³ So the occupant of a store is entitled to have the occupant of an adjoining store enjoined from obstructing light and view by a show case, sign, and fence on the sidewalk.⁴ And where it appeared that defendants were about to raise the grade of the street three feet above the level of plaintiff's property, it was held that this was an obstruction of plaintiff's reasonable use of the street, for which injunction would lie, in the absence of anything

¹ Northern Cent. Ry. Co. v. Harrisburg & M. Electric Ry. Co., 35 A. 624; 177 Pa. St. 142; 84 A. L. R. A. 572. See *Ex parte* Hampton & B. Railroad & Lumber Co., 45 S. C. 122.

² Leonard v. Hart, (N. J.) 7 A. 865; Stanford v. Lyon, Ib. 869.

³ Cook v. Benson, 62 Iowa, 170.

⁴ Hallock v. Scheyer, 33 Hun (N. Y.), 111.

to show that defendants were proceeding under legal authority in a legal manner, and that it was unnecessary to show defendants' insolvency.¹ But an injunction should in no case be issued to restrain the proper and legitimate use of a street. Thus it was decided that the writ should not be issued to restrain defendants from maintaining a permanent bridge across a gutter in the street in front of their premises, it appearing that such bridge was constructed pursuant to an ordinance of the city, and that it might be proper for lawful uses, other than driving or backing teams or wagons on the sidewalk.²

§ 227. **Building, or Railroad, in Street.** — The erection of a building or the construction of a railroad in a street without legal authority is unquestionably a nuisance which may be enjoined.³ Not only may an abutting owner enjoin it, but an injunction will be granted against the illegal obstruction on application of the municipality.⁴ It is also a new servitude entitling the abutting landowners to damages, or an injunction.⁵ And where it obstructs the egress and ingress of adjoining lot or land owners to and from their premises, it may be enjoined on the ground that it is a disturbance of an easement.⁶ But to sustain an action on

¹ *Schaufele v. Doyle*, 86 Cal. 107; 24 P. 834. See also *Stockton v. Atlantic Highlands, R. B. & L. B. Electric Ry. Co.*, (N. J. Ch.) 32 A. 680; 53 N. J. Eq. 418; *Canastota Knife Co. v. Newington Tramway Co.*, (Conn.) 36 A. 1107; 69 Conn. 146; *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 and 3*, 90 F. 608. One owner of a river lot, on complaint, showing that an adjacent owner threatens so to grade down a certain street next to the river as permanently to injure the complainant's improvements, or to render the enjoyment of his lot less convenient, may have such grading enjoined. *Price v. Knott*, 8 Or. 438. See also *Cunningham v. Fitzgerald*, (Sup.) 17 N. Y. S. 341.

² *Richardson & Boynton Co. v. Barstow Stove Co.*, 11 N. Y. S. 935.

³ *Infra*, §§ 421-425.

⁴ *City of Gloversville v. Johnstown, G. & K. Horse R. Co.*, 21 N. Y. S. 146; 66 Hun, 627.

⁵ *Supra*, § 221.

⁶ *Beeson v. City of Chicago*, (C. C.) 75 F. 880; *Irvine v. Atlantic Ave. R. Co.*, (Sup.) 42 N. Y. S. 1103; 10 App. Div. 560; *Hopkins v. Catasauqua Manuf'g Co.*, 36 A. 735; 180 Pa. St. 199; *Coatsworth v. Leigh Val. Ry. Co.*, 51 N. E. 301; 156 N. Y. 451; *Hart v. Buckner*, (C. C. A.) 54 F. 925; *Gustafson v. Hamm*, (Minn.) 57 N. W. 1054; *Merriman v. Utica Belt Line St. R. Co.*, (Sup.) 41 N. Y. S. 1049; 18 Misc. Rep. 269. But injunction will not lie by abutting owners to prevent the construction of an elevated railroad on the ground that the ordinance under which the work is to be done is invalid. *Phelps v. Lake St. El. R. Co.*, 60 Ill. App. 471; *Strong v. Northwestern El. R. Co.*, 64 Ill. App. 533; *Stockton v. North Jersey St. Ry. Co.*, (N. J. Ch.) 34 A. 688.

this ground, special injury must be shown.¹ Nor where a company is authorized to construct and operate a railroad track in a street can a court restrict the number of trains to be operated as a condition precedent to the construction of the track.² In a proper case, however, injunction to restrain the shutting up of a private way, which furnishes the only convenient egress from plaintiff's land to the public highway, may be granted, even though the act sought to be restrained has been committed.³

§ 228. **Right of Way of Railroad through Canyon.** — An injunction does not lie in favor of one railroad company to restrain another from grading and laying its track through a gap wherein the complainant's line has already been surveyed and to which it has an alleged prior right, unless it appears that irreparable injury is likely to result from a refusal to grant the relief.⁴ Where, however, one company has already constructed its road through a canyon, another cannot condemn it without showing a superior public use.⁵ And where one railroad company constructed its roadbed and obtained its right of way through a defile or canyon, the court granted an injunction restraining another railroad corporation, authorized to build to the same point, from going upon or interfering with the track or right of way of the corporation first in possession, until an adjustment of rights could be made by the court under the general railroad law authorizing railroad crossings, etc.⁶

¹ *Arkansas River Packet Company v. Sorrells*, 50 Ark. 466; 8 S. W. 683. Warehouse and ditch in street; *Appeal of Campbell*, 118 Pa. 128; 12 A. 299. Railroad intersecting public road, see *Dodge v. Pennsylvania R. Co.*, 43 N. J. 351; 11 A. 751; *supra*, § 222.

² *Kentucky & I. Bridge Co. v. Kreiger*, (Ky.) 19 S. W. 738.

³ *Lakenan v. Hannibal & St. Jr. Co.*, 36 Mo. App. 363. Under Rev. St. Ill. c. 24, art. 5, item 90, declaring that a city council shall have no power to grant the right to lay down railroad tracks in any street of the city except upon the petition of the owners of more than half of the street frontage, an injunction may issue at the instance of an abutting owner to enjoin the laying down of railroad tracks under an ordinance granting permission without the requisite petition. *Bez v. Chicago, R. I. & P. Ry. Co.*, 23 Ill. App. 137.

⁴ *Western, etc. R. Co. v. Georgia, etc. R. Co.*, 88 N. Car. 79; *Fitchburg R. Co. v. New Haven, etc. Co.*, 134 Mass. 547; *Chicago, etc. R. Co. v. Joilet, etc. R. Co.*, 105 Ill. 889.

⁵ *Denver, etc. R. Co. v. Denver, etc. R. Co.*, (Col.) 14 Am. & Eng. R. R. Cas. 83.

⁶ *Montana Cen. Ry. Co. v. Helena & R. M. R. Co.*, 6 Mont. 131; 12 P. 910; Rev. St. Mont. p. 464, div. 5, art. 3, c. 15, 309.

§ 229. **Miscellaneous Encroachments upon Easements of Public Nature — Telegraph and Telephone Poles and Wires.** — As has been stated in other connections, easements or servitudes annexed by covenants or otherwise to private estates, and privileges of a public nature, as where contiguous to public squares or other public places dedicated to public uses and secured to the proprietors, will be secured to the latter, to the extent of their beneficial use and occupancy, against encroachments, by injunction.¹

This principle has of late received new and somewhat novel application. In an action by a telephone company to restrain an electric light company from erecting its poles and wires on the same street occupied by the telephone wires, it appearing that defendant first occupied the street in pursuance of prior authority, but it being shown that the erection of the telephone wires near the electric light wires would injure the usefulness of the electric light wires, and no affirmative relief being demanded by the answer or sought at the trial, a decree restraining the telephone company from placing its line of wires near the wires of the electric light company was reversed.² But where there were grave doubts as to the validity of an act of the New York legislature, to the extent that it permitted a telegraph company to be deprived of its right to maintain its wires on the structures of an elevated railroad, which was a post-road, an injunction against any interference with the wires thereon was granted until the question could be passed on by the court of last resort, the maintenance of wires thereon not being attended with any public inconvenience.³ Without an exclusive right, one company cannot enjoin another from using subways for electric wires.⁴

§ 230. **Lateral Support — Mining Operations.** — The jurisdiction

¹ *Hills v. Miller*, 3 Paige, 254; *Corning v. Lowerre*, 6 Johns. Ch. 439; *Trustees of Watertown v. Cowen*, 4 Paige, 510, 514. See also *Flood v. Van Wormer*, (Sup.) 24 N. Y. S. 460.

² *Nebraska Tel. Co. v. York Gas & Electric Light Co.*, 27 Neb. 284; 43 N. W. 126. An electric lighting company who uses, without permission from the city, the probate court, or another company, poles erected by such other company for its own use, will be enjoined. *Haus Electric, etc. Co. v. Jones Bros. Electric Co.*, 23 Week. Law Bul. 137. See also *City of Utica v. Utica Tel. Co.*, 48 N. Y. S. 916; 24 App. Div. 361.

³ *Western Union Tel. Co. v. City of New York*, 38 F. 552. See also *Borough of Brigantine v. Holland Trust Co.*, (N. J. Ch.) 35 A. 344.

⁴ *Empire City Subway Co. v. Broadway & S. A. R. Co.*, (Sup.) 33 N. Y. S. 1055; 87 Hun, 270.

of courts of equity to prevent by injunction adjoining landowners from digging in the soil of their own land so as to endanger their neighbors' buildings is well established. A landowner has a right, independent of prescription, to the lateral support of his neighbor's land so far as that is necessary to sustain his soil in its natural state; and he may acquire by twenty years' enjoyment the right to lateral support for the additional weight of buildings erected on the land.¹ Where residences and other buildings on one's own premises are injured by mining operations in adjoining land which would cause the soil to subside unless their continuance be prevented, a decree of perpetual injunction as well as for compensation will be awarded. Such relief in this class of cases has often been afforded by English courts of equity.² There is a *prima facie* inference at common law upon every demise of minerals or other subjacent strata, where the surface is retained by the lessor, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right to support. In the absence of express words showing clearly that he has waived or qualified his right, the presumption is, that what he retains is to be enjoyed by him *modo et forma*, and with the natural support which it possessed before the demise.³

§ 231. **Excavations generally.** — The principle is not confined to disturbances of the right to lateral support growing out of mining operations, but extends to excavations generally; and a court of equity in all proper cases will enjoin the owner of land adjoining the plaintiff's premises, from removing any soil, in such manner as to cause the plaintiff's land, by reason of the withdrawal of its lateral support, to fall away or subside.⁴ But where no serious injury to the adjoining realty is imminent, and there is nothing peculiar in the situation and circumstances of the subject-matter, or relation of the parties, the court will decline to interfere.⁵ And care should be taken, even in a proper case for relief,

¹ Hunt v. Peake, Johns. (Eng. Ch.) 705; s. c. 6 John. n. s. 1071.

² Caledonian Railway Co. v. Sprot, 2 McQueen's H. L. C. 449; Humphries v. Brogden, 12 Queen's Bench, 739; Rowbotham v. Wilson, 6 El. & Bl. 593; Arkwright v. Gell, 5 M. & W. 203; Acton v. Blundell, 12 M. & W. 324; Dickinson v. Grand J. Canal Co., 7 Exch. 282; Chasemore v. Richards; 7 W. R. 685; Solomon v. Vintner's Company, 7 W. R. 613; s. c. 28 L. J. n. s. Ex. 370.

³ See Dugdale v. Robinson, 3 K. & J. 695.

⁴ Farrand v. Marshall, 21 Barb. (N. Y.) 409.

⁵ McMaugh v. Burke, 12 R. I. 499. Compare Trowbridge v. True, 52 Conn.

that the remedy be not so broad as to prevent legitimate street improvements.¹ One may, however, acquire by prescription for the statutory period as well as by contract, a right to lateral support for his land with the buildings thereon.² While there are few American cases in which equitable interference was successfully invoked, the right to protection in the prescriptive right to lateral support has been admitted in several cases.³

§ 232. **Party Walls.** — Closely connected with the subject of the right to lateral support of the soil, are those rights pertaining to party walls between coterminous premises. An injunction will be granted to restrain a grantee of one-half of a party wall from using it for other purposes than as a support for his building to the detriment of his co-tenant.⁴ So the co-owner of an ancient party wall long used for the support of buildings on each side of it, was restrained from cutting away a portion of its face and erecting a new wall upon his own land, at a distance of a few inches, but connected with the old wall by occasional bricks and ties.⁵ But one who, in erecting a building upon his own land,

190; s. c. 52 Am. Rep. 570, holding that the right to lateral support of the soil will be protected by injunction, although the pecuniary damage is slight, and may be easily compensated in damages.

¹ *Cunningham v. Fitzgerald*, 33 N. E. 840; 138 N. Y. 165. See also *Perkins v. Turnpike Co.*, 48 N. J. Eq. 499.

² See *Lasala v. Holbrook*, 4 Paige (N. Y.), 173; 25 Am. Dec. 524, where the court said: "There is another class of cases, however, where the owner of a building on the adjacent lot is entitled to full protection against the consequences of any new excavation or alteration of the premises intended to be improved, by which he may be in any way prejudiced. These are ancient buildings, or those which have been erected upon ancient foundations." See also *Partridge v. Scott*, 8 Mee. & W. 220.

³ See *Stevenson v. Wallace*, 27 Grat. (Va.) 77; *Hide v. Thornborough*, 2 Car. & Kir. 250; *Story v. Odin*, 12 Mass. 157; *Quincy v. Jones*, 76 Ill. 231; *Brown v. Windsor*, 1 Crompt. & J. 20. A complaint which alleges that plaintiffs own mining claims adjoining and above defendants' land, and that they have a right to dig trenches and construct flumes across defendants' land, and have so constructed trenches and flumes, which defendants are filling and destroying, and will continue to do so unless restrained by order of court, shows a *prima facie* case for granting a temporary injunction. *Power v. Klein*, (Mont.) 27 P. 513.

⁴ *Ogden v. Jones*, 2 Bosw. (N. Y.) 685.

⁵ *Phillips v. Boardman*, 4 Allen (Mass.) 147. The plaintiff had been for seventeen years in the peaceable possession of one-half of a double house. He supposed that the centre of the house was the dividing line between his lot and the adjoining lot, upon which the other half of the house, owned by the defendant, rested. It appeared, however, that the plaintiff's tenement stood some three feet upon the defendant's lot. The defendant, wishing to

inserts the beams which support it in a wall standing upon the premises of an adjoining owner, without his consent, cannot restrain such owner from taking down the wall; and a mere license from the owner to put a window and shutter in the wall for the use of the building so erected, is not a ratification of the act of inserting the beams.¹ And upon the principle that he who seeks equity must do equity, so long as the plaintiff's wall, laid on his own land, projects over the defendant's land, the court will not compel the defendant to desist from using it as a party wall.²

§ 233. **Ancient Lights — General View of Subject.** — Undoubtedly injunction is still a proper and salutary remedy to prevent the darkening or obstruction of the lights to which the occupants of a dwelling-house are entitled.³ But this branch of jurisdiction, though exercised frequently in former times, has more recently become of little importance. Though theoretically there may be a prior or prescriptive right to the enjoyment of light from a particular direction or in a particular manner, yet courts of equity are seldom called upon for a strict maintenance of such right. This is chiefly owing, no doubt, to the general concession in favor of improvement of realty in cities and the facilities afforded by modern invention for obtaining light from new sources and directions, when windows and other means of ingress have been taken away or rendered useless.

The English courts long ago began to entertain with disfavor build, attempted to cut through the plaintiff's house on the true line, whereupon the plaintiff applied for an injunction to restrain defendant. The injunction was granted, and finally made permanent. *Held*, that only a temporary injunction should have been granted, in order that the defendant might test the title by an action at law. *Echelkamp v. Schrader*, 45 Mo. 505.

¹ *Roberts v. White*, 2 Robt. (N. Y.) 425.

² *Guttenberger v. Woods*, 51 Cal. 523.

³ See *Sutton v. Montford*, 4 Sim. 559; *Back v. Stacy*, 2 Russ., &c. 121; *Wynstanley v. Lee*, 2 Swanst. 333; *Attorney-General v. Nichol*, 16 Ves. 338; *Morris v. Berkley's Lessees*, 2 Ves. 453; *Fishmongers' Co. v. East India Co.*, 1 Dick. 163; *Corning v. Lowerre*, 6 Johns. Ch. 439. Equity will enjoin against the removal of a division fence, entry and excavation upon plaintiff's lot, and erection of a building thereon, shutting off light and air from plaintiff's house, and undermining it. In such a case damages already incurred will be assessed, and judgment given for the amount. *Fox v. Fitzsimmons*, 29 Hun (N. Y.), 574. But an injunction will not be granted to the defendant from building so as to shut up a window, alleged to be ancient, in the gable end of complainant's house, the complainant's house being built on the line of his lot adjoining the defendant's. *King v. Miller*, 9 N. J. L. (4 Hals.) 559.

bills to enjoin the obstruction of ancient lights. Accordingly, the rule that no alteration of an ancient light in the dominant tenement would justify the owner of the servient tenement in obstructing what remained of the ancient light,¹ has since received the qualification that no person can so use his own property as to acquire by the use of it a new and distinct right over the property of his neighbor.²

§ 234. **Nature of Injury justifying Interference.** — A court of equity will not interfere for the protection of a mere naked legal right in such cases, but only in cases of flagrant wrong, and where the injury is substantial and serious.³ And yet in order to give equity jurisdiction to enjoin an interference with an easement, it is not necessary that it be absolutely essential to the enjoyment of the estate to which it is appurtenant. That it is highly beneficial and convenient therefor is sufficient.⁴ No doubt equity would still restrain by injunction the violation of a con-

¹ *Tapling v. Jones*, 11 H. L. Cas. 290; s. c. 13 W. R. 617.

² *Heath v. Bucknell*, L. R. 8 Eq. 1; s. c. 17 W. R. 755. See also *Carriers' Company v. Corbett*, 2 Dr. & Sm. 355.

³ *Beadell v. Perry*, 17 W. R. 185; *Durrell v. Pritchard*, L. R. 1 Ch. App. 244; s. c. 14 W. R. 212; *Sparling v. Clarson*, 17 W. R. 518; *Western Railway of Alabama v. Alabama G. T. R. Co.*, 96 Ala. 272; *Rome St. R. Co. v. Van Dyke*, (Ga.) 17 S. E. 906; *Wormser v. Brown*, 43 N. E. 524; 149 N. Y. 163; *Pennsylvania R. Co. v. Glenwood & D. Electric St. Ry. Co.*, 39 A. 80; 184 Pa. St. 227. See also *Woodbury v. Society*, 90 Me. 18. The liberal view of the right to ancient lights which one obtained was expressed in *Yates v. Jack*, L. R. 1 Ch. App. 295, where it was held that the owner of ancient lights was entitled not only to the light required for his present business, but to all which he previously enjoyed. But in *Clarke v. Clarke*, L. R. 1 Ch. App. 16, it was held that, in towns, equity would only interfere where an erection would interfere with the ordinary occupations of life; or (in a later case) make a house substantially less fit for occupation. See *Kelk v. Pearson*, L. R. 6 Ch. App. 809. To warrant an injunction in such cases, there must be some material injury to the comfort of those dwelling in the house about to be darkened. *Atty.-Gen. v. Nichols*, 16 Ves. 338. In this case Lord Eldon said: "The question is whether the effect is such an obstruction as the party has no right to erect, and cannot erect without those mischievous consequences which upon equitable principles should be not only compensated in damages but prevented by injunction." See also *Beck v. Stacey*, 2 Car. & P. 465; *Weston v. Arnold*, L. R. 8 Ch. 1084; *Leecher v. Schueder*, L. R. 9 Ch. 463; *Dyers' Company v. King*, L. R. 9 Eq. 438.

⁴ *Smith v. Young*, 43 N. E. 486; 160 Ill. 163. See also *Greer v. Van Meter*, (N. J. Ch.) 33 A. 794; *Central Crosstown Ry. Co. v. Metropolitan St. Ry. Co.*, (Sup.) 44 N. Y. S. 752; 16 App. Div. 229; *New York, N. H. & H. R. Co. v. Fair Haven & W. R. Co.*, 40 A. 607.

ing notice of the terms of such contracts or covenants, will be bound by them, and may be enjoined in proper cases from violations of the same. Thus, where owners of land grant the right to a railroad company to use water from a spring on their land, and to lay pipes from such spring to a certain tank, by a contract which is duly recorded, one who purchases the land many years afterwards, with actual knowledge that the pipes were laid across the land, and that the topography of the land renders it necessary that they should be laid just as they are, takes subject to such easement, and is properly enjoined from interfering therewith, and it is immaterial that the tank is not located in the exact place specified in the contract, where the change does not affect the position of the pipes.¹

§ 237. **Reservation in Grant or Lease.** — A grantor, who has reserved an easement to light and air from the premises sold, may enjoin building thereon, on showing that it would result in a substantial loss of light and air to his windows.² And evidence that the lessor refused the lessee, at the time the lease was made, the use of an adjoining lot, on the ground that he, or a purchaser from him, might want to build thereon, no kind of building being specified, is no bar to a bill to restrain a purchaser from erecting a building over the whole of said lot in such a manner as to obstruct the lessee's light and air.³

such use of the land granted as would render the road impassable, or otherwise interfere with its use by the grantee for the purposes of a carriage road.

¹ *Diffendal v. Virginia M. Ry. Co.*, 86 Va. 459; 10 S. E. 536.

PURCHASER OF LOTS FROM PLAT. — The owner of lots of land on each side of a public street made a plan, showing an additional strip of eight feet in width, on each side of the street, according to which he sold the lots, representing that said strip was not to be built upon. Prior grantees of some of said lots having complied with said representations, and left said strip open, they were held to be entitled to restrain grantees of the remaining lots, with notice of said representations, from building upon said strip. *Tallmadge v. East River Bank*, 26 N. Y. 105.

² *Hagerty v. Lee*, 45 N. J. 1; 15 A. 399.

³ *Ware v. Chew*, 43 N. J. 493; 11 A. 746.

IV. TO PREVENT DESTRUCTION OF AND INJURY TO SUBSTANCE, OR WASTE.

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| <p>§ 238. Defined and distinguished from Trespass.</p> <p>239. Changes in Practice.</p> <p>240. Common-law Remedies.</p> <p>241. General Principles.</p> <p>242. Same — Grounds of the Jurisdiction.</p> <p>243. What required to justify Injunction.</p> <p>244. Single Instance of Waste will warrant Interference.</p> <p>245. Acts which will be enjoined as Waste.</p> <p>246. Title of Complainant.</p> <p>247. Title in Dispute.</p> <p>248. Same — Solvency of Defendant; Contest pending in Government Land-office.</p> <p>249. Remedy at Law.</p> <p>250. Injunction refused where Legal Remedy is adequate.</p> <p>251. Cutting Timber.</p> <p>252. Same — Compelling Timber to be felled.</p> | <p>§ 253. Timber planted for Ornament.</p> <p>254. Removal of Timber already cut.</p> <p>255. Waste on Mining Property.</p> <p>256. Threatened Waste.</p> <p>257. Equitable Waste.</p> <p>258. Pending Litigation.</p> <p>259. Pending Appeal.</p> <p>260. Waste in Park; Keeping up Herd of Deer.</p> <p>261. On Government Land.</p> <p>262. Waste by Lessee.</p> <p>263. Merely Nominal Waste not enjoined.</p> <p>264. Tenant for Life.</p> <p>265. Neither Smallness nor Remoteness of Interest material.</p> <p>266. In Favor of Mortgagees.</p> <p>267. Against Vendee in Possession.</p> <p>268. Against Grantor in Possession.</p> <p>269. Waste beyond Jurisdiction of Court enjoined.</p> <p>270. Purchaser at Judicial Sale.</p> <p>271. Judgment Creditors.</p> <p>272. Attaching Creditor.</p> |
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§ 238. **Defined and distinguished from Trespass.** — It is sometimes important in considering preventive relief against injuries to real property, to bear in mind the distinction between waste and trespass. Waste is spoil or destruction in houses, gardens, trees, or other corporeal hereditaments to the disherison of him that hath the remainder or reversion in fee simple or fee tail.¹ Waste has been said to be a destructive use of realty by one lawfully in possession thereof.² Trespass in its widest sense includes not only waste but nuisance, and is any misfeasance or act of one man whereby another is injuriously treated or damnified.³

§ 239. **Changes in Practice.** — But with respect to the extent and imminency of the injury which will warrant preventive relief against waste and trespass, the tendency of the courts, in an early period of English jurisprudence, was to place them upon

¹ 2 Bl. Com. 281.

² Hill v. Bowrie, 1 Bland (Md.), 593.

³ 3 Bl. Com. 208; 2 Bouv. L. Dic. 747.

the same footing. In neither class of wrongs would courts of equity interfere unless the acts complained of or threatened amounted to such flagrant spoliation as to justify the court in departing from the general rule of leaving parties to their remedies at law. Formerly an injunction would only be granted where, supposing the waste to have been already committed, complainant would be entitled to an action at law for damages.¹ But the remedy by injunction is now applicable to every species of waste although for such waste at common law an action for waste would not lie.²

§ 240. **Common-law Remedies.** — At common law the remedy for waste was by writ of prohibition from the court of chancery, which was considered as the foundation of a suit between the party suffering by the waste and the party committing it. The remedy by *estrepement* was applicable only to cases of real actions; and when the proceeding by ejectment became the usual mode of trying title to land, the writ of *estrepement* did not apply; therefore courts of equity acting upon the principle of preserving the property *pendente lite* supplied the defect and interposed by way of injunction.³ The action of waste long since became in-

¹ *Hawley v. Clowes*, 2 Johns. (N. Y.) Ch. 122; *Twort v. Twort*, 16 Ves. 589; *Northrup v. Trask*, 39 Wis. 515; *Kane v. Vanderburgh*, 1 Johns. (N. Y.) Ch. 11; *Mutual Life Ins. Co. v. Newburg Bank*, 79 N. Y. 568; *Watson v. Hunter*, 5 Johns. (N. Y.) Ch. 169; *Markham v. Howell*, 33 Ga. 508; *Peak v. Hayden*, 3 Bush (Ky.), 125; *Leroy v. Wright*, 4 Sawy. (U. S.) 530.

² *Denny v. Brunson*, 29 Pa. St. 382; *Darrell v. Champeness*, 1 Eq. Cas. Ab. 400; *Dennett v. Dennett*, 43 N. H. 503; *Birch-Wolfe v. Wolfe*, L. R. 9 Eq. Cas. 693. See *Mallineaux v. Paschal*, 3 P. Wms. 268; *Duvall v. Waters*, 1 Bland (Md.), 576; *Clement v. Wheeler*, 25 N. H. 361; *Sarles v. Sarles*, 3 Sandf. (N. Y.) Ch. 601; *Lewis v. Christian*, 40 Ga. 187; *Lyon v. Hunt*, 11 Ala. 295; *Attaquin v. Fish*, 5 Met. (Mass.) 140; *Ware v. Ware*, 2 Hals. (N. J.) 117; *Perrot v. Perrot*, 3 Atk. 94; *Robinson v. Litton*, Id. 209. Under the old practice an injunction was granted before answer to stay waste, by a person having no interest in the thing wasted, but merely acting as a servant. *Orrery (Lord) v. Newton*, Ridg. 252. "The jurisdiction of English equity in cases of waste began with the injunction *pendente lite*, but has long since extended itself to cases where no action at law was pending, but where it was needed for the protection of trust estates and estates in reversion and remainder, and has now become one of the well-defined branches of equity jurisprudence. Per Woodward, J., *Denny v. Brunson*, 29 Penn. 384. And an injunction to stay waste has become almost a matter of course." *Smith v. City, etc.*, 19 Ga. 89.

³ Mitf. Eq. Pl. by Jeremy, 136; *Pultney v. Shelton*, 5 Ves. 261, note; *Cooper*, Eq. Pl. 146, 147; 3 Bl. Com. 227; *Peak v. Hayden*, 3 Bush (Ky.), 125; *Markham v. Howell*, 33 Ga. 508; *Eden on Injunct.* ch. 9, p. 159; *Com. Dig.*

frequent even in England,¹ and has scarcely been known in this country, an action on the case being generally substituted in its place whenever any remedy was sought at law. The superior efficacy and convenience of the remedy by bill in equity is universally recognized, and the equitable remedy almost invariably resorted to. On such a bill, not only may future waste be prevented, but an account may be decreed and compensation obtained for past waste. There is in fact no remedy at law for permissive waste; but in equity an injunction lies to restrain permissive as well as voluntary waste.²

§ 241. **General Principles.** — “The jurisdiction of courts of equity,” says Justice Story, “to interpose, by way of injunction, in cases of waste, may be referred to the broadest principles of social justice. It is exerted, where the remedy at law is imperfect, or is wholly denied; where the nature of the injury is such that a preventive remedy is indispensable, and it should be permanent; where matters of discovery and account are incidental to the proper relief; and where equitable rights and equitable injuries call for redress, to prevent a malicious, wanton, and capricious abuse of their legal rights and authorities by persons having but temporary and limited interests in the subject-matter.”³ From the nature of the case, and as demon-

Waste, A. B.; Fitz. Nat. Brev. 60; Cooper, Eq. Pl. 147, 148. A fuller account of the writ of *estrepement* is given by Blackstone. The following is a brief extract: “*Estrepement* is an old French word, signifying the same as waste or extirpation; and the writ of *estrepement* lay at the common law after judgment obtained in any action real (2 Inst. 828), and before possession was delivered by the sheriff, to stop any waste which the vanquished party might be tempted to commit in lands which were determined to be no longer his. But, as in some cases, the demandant may be justly apprehensive that the tenant may make waste, or *estrepement*, pending the suit, well knowing the weakness of his title; therefore the statute of Gloucester (Edw. I. ch. 13), gave another writ of *estrepement*, *pendente placito*, commanding the sheriff firmly to inhibit the tenant, ‘*Ne faciat vastum vel estrepamentum pendente placito dicto indiscusso*’ (Regist. 77). And by virtue of either of these writs, the sheriff may resist them that do, or offer to do waste, and, if otherwise he cannot prevent them, he may lawfully imprison the wasters, or make a warrant to others to imprison them; or, if necessity require, he may take the *posse comitatus* to his assistance. So odious, in the sight of the law, is waste and destruction.” 3 Bl. Com. 225–227.

¹ 3 Bl. Comm. 225, 226; Harrow School v. Alderton, 2 Bos. & Pull. 86; Redfern v. Smith, 1 Bing. 382; 2 Bing. 262.

² Caldwell v. Baylis, 2 Meriv. 408; 1 Fonbl. Eq. B. 1, ch. 1, sec. 5.

³ Story’s Eq. Jur. 919, citing Watson v. Hunter, 5 Johns. Ch. 170; Jeremy on Eq. Jurisd., B. 3, ch. 2, sec. 1, pp. 327, 328; Winship v. Pitts, 3 Paige, 259.

strated by the grounds upon which courts of equity have from time to time interfered to prevent waste, the inadequacy of common-law remedies, as well to prevent waste as to give redress for waste already committed, is so apparent, that there is little wonder that resort to courts of law for this cause has fallen into general disuse.

§ 242. **Same — Grounds of the Jurisdiction.** — The interference of equity in cases of waste “is a wholesome jurisdiction, to be liberally exercised;” and depends on much latitude of discretion in the court,¹ and has come to be allowed very much as a matter of course.² The court will restrain waste in an underlessee at the suit of the ground landlord; also, against a first tenant for life, at the suit of the remainderman, notwithstanding an intermediate life estate; also, against a mortgagor committing waste to the prejudice of the mortgagee.³ At any rate an injunction will be granted in all such cases where it is shown that the defendant, in an action at law, would be unable to respond in damages.⁴ Equity takes jurisdiction to restrain waste by injunction, and in some particular cases, to obtain a discovery and account, and having for these objects obtained jurisdiction of a cause, it proceeds, in order to avoid multiplicity of suits, to compensate for damages done. But the jurisdiction itself must rest in the first instance on the necessity for an injunction, or discovery and account.⁵

§ 243. **What required to justify Injunction.** — The court will restrain waste, although the act done may lead to the improvement of the land, if it immediately occasion any damage to the inheritance; and the court will not refuse to restrain waste by which the estate is not necessarily and permanently improved, on the mere ground that the party has done other acts which will benefit the estate; therefore, an injunction to restrain cutting turf will not be refused on the ground that the tenant has con-

¹ *Kane v. Vanderburgh*, 1 Johns. Ch. 11.

² *Markham v. Howell*, 33 Ga. 508; *Smith v. City Council of Rome*, 19 Ga. 89; *Griffin v. Sketoe*, 30 Id. 300.

³ *Farrant v. Lovel*, 3 Atk. 723.

⁴ *Kinsler v. Clarke*, 2 Hill (N. Y.) Ch. 617; *Snyder v. Hopkins*, 31 Kan. 557; *Natoma, etc. Co. v. Clarkin*, 14 Cal. 544; *Ehradt v. Boaro*, 113 U. S. 537; *Cornelius v. Post*, 9 N. J. Eq. (1 Stock.) 196; *Tainter v. Mayor*, 19 N. J. Eq. 46. See also *De La Croix v. Villere*, 11 La. An. 89.

⁵ *Lefforge v. West*, 2 Carter (Ind.), 514.

verted the cut-out bog into arable land.¹ As a general rule, however, there can be no waste unless the acts complained of either increase the burdens upon the estate, impair the evidence of the title of the reversioner, or diminish the value of the property; or, in the words of Blackstone, operate "to the disherison of him that hath the remainder or reversion."² In theory, an injunction is not granted to stay waste unless it appear that the injury would be irreparable, either because of the impossibility of estimating the damages at law, because of the insolvency of the defendant, or that a resort to law would result in interminable litigation.³ But the inadequacy of legal remedies in this class of cases is generally so obvious that an injunction will be granted almost as a matter of course; certainly upon slight evidence of the destructive character of the waste, or of its being committed wantonly or maliciously.⁴

To constitute waste it is essential that the wrong-doer be in the actual possession of the premises, such possession constituting the distinction between waste and trespass, a principal element of the latter being a wrong done to one in possession.⁵

§ 244. **Single Instance of Waste will warrant Interference.** — In a bill for waste, a single clear instance of waste, committed intentionally, is sufficient to entitle the complainant to an injunction or

¹ *Coppinger v. Gubbins*, 3 J. & Lat. 397; 9 Ir. Eq. Rep. 304; *Leeds (Duke) v. Amherst*, 2 Ph. 122.

² 2 Bl. Comm. 281. See also *Huntley v. Russell*, 13 Q. B. 588; *McGregor v. Brown*, 10 N. Y. 114; *Proffitt v. Henderson*, 29 Mo. 327.

³ *Hillman v. Hurley*, 82 Ky. 626; *Lurting v. Conn*, 1 Ired. Ch. 273; *Fleming v. Collins*, 2 Del. Ch. 230; *Bogey v. Shute*, 4 Jones Eq. (N. Car.) 174; *Green v. Keen*, 4 Md. 98; *Nethery v. Payne*, 71 Ga. 374; *Hamilton v. Ely*, 4 Gill (Md.), 34. In such cases the court proceeds upon the ground of irreparable injury. *Doran v. Carroll*, 11 Ir. Ch. Rep. 379; *Att'y-Gen. v. Sheffield Gas Co.*, 3 De G. M. & G. 321; *Lambert v. Lambert*, 2 Ir. Eq. Rep. 210.

⁴ *Rakes v. Rustin Land, Mining, & Manufacturing Co.*, (Va.) 22 S. E. 498.

⁵ *Cooley on Torts*, 232; *Davis v. Leo*, 6 Ves. 784. See *Poindexter v. Henderson*, Walk. (Miss.) 177; *Denny v. Brunson*, 29 Pa. St. 382; *Pillsworth v. Hopton*, 6 Ves. 51; *Talbot v. Hope Scott*, 4 Kay & J. 96; *Nevitt v. Gillespie*, 1 How. (Miss.) 108. Compare *More v. Messini*, 32 Cal. 590; *Thurston v. Mustin*, 3 Cranch C. Ct. 335. It has been held that an injunction will lie to restrain a threatened injury to real property in the nature of waste, although the plaintiff is in possession of the land. *More v. Messini*, 32 Cal. 590. If the complainant's title be subordinate to or admit the existence of a superior title, his possession under it will not be considered adverse, regardless of its duration, and equity will not interfere. Such adverse possession, to warrant interference, must be accompanied with a positive and exclusive claim to the entire title. *Dean v. Brown*, 23 Md. 11.

a continuance of an injunction previously granted, and to a decree for an accounting.¹ But a single threat unaccompanied by facts or acts indicating evident determination to carry out such threat, is not sufficient. Thus, it was held that the court would not restrain the owner of a determinable estate in the enjoyment of his rights, on proof of an isolated conversation between him and the ulterior claimant, during which the former, under the excitement of spirits and of an angry quarrel, made a threat to run the property off and defeat the expectancy.²

§ 245. **Acts which will be enjoined as Waste.** — It has been said that only a wanton and unconscientious abuse of his rights by a tenant, such as is ruinous to the rights of others, will be enjoined.³ But any material change in the nature and character of the buildings made by the tenant is waste, although the value of the property should be enhanced by the alteration.⁴ And the erection of a chimney where there was none was held to constitute waste.⁵

¹ *Serles v. Serles*, 3 Sandf. (N. Y.) Ch. 601. A removal, by the mortgagor's alienee, of old building planks and half-decayed fences, — the whole not worth over \$50, — held, not to warrant issuance of an injunction against future waste. *Coker v. Whitlock*, 54 Ala. 180.

² *Airs v. Billops*, 4 Jones (N. C.) Eq. 17.

³ 2 Story's Eq. Juris., sec. 915; *Erhardt v. Boaro*, 113 U. S. 537; *Robinson v. Litton*, 3 Atk. 215; *Pentland v. Somervill*, 2 Ir. Ch. 289; *Vane v. Barnard*, 1 Salk. 161; s. c. 2 Vern. 738; *Clement v. Wheeler*, 25 N. H. 360; *Packington v. Packington*, 3 Atk. 215; *Strathmore v. Bowes*, 2 Bro. C. C. 88; *Aston v. Aston*, 1 Ves. 264; *Marker v. Marker*, 9 Hare, 1; *Perrot v. Perrot*, 3 Atk. 94; *Farrant v. Lovel*, Id. 723; *Burgess v. Lamb*, 16 Ves. 135; *Garth v. Cotton*, 1 Ves. 556; *Wombwell v. Bellasyse*, 6 Ves. 110; *Abraham v. Bubb*, 2 Freem. (Miss.) Ch. 53.

ACTS HELD NOT TO CONSTITUTE WASTE. — A complaint alleging that, at a tax sale, plaintiff purchased a certain lot of which he subsequently obtained a tax-deed, and that, at a specified time, after the sale and before the deed was issued, defendant unlawfully broke and entered upon the lot, and removed the fences and dwelling-house thereon, and committed other acts of waste, demanding a money judgment, and that defendant be restrained from committing further waste upon the premises, discloses a naked trespass by one in no way related to the title or possession, and is bad on demurrer. *Lander v. Hall*, 69 Wis. 326; 34 N. W. 80. The right to an injunction to stay waste, — determined: in cases depending on particular facts. *Wagner v. Cohen*, 6 Gill (Md.), 97; *Pfeltz v. Pfeltz*, 14 Md. 2376; *Coster v. Griswold*, 4 Edw. (N. Y.) 364. Where the court had granted an injunction from further digging a ditch, the court would not order it to be filled up until after answer. *Anon.*, 1 Ves. Jr. 140.

⁴ *Kidd v. Dennison*, 6 Barb. (N. Y.) 13; *Brock v. Dole*, 66 Wis. 142; *Willard's Eq. Jur.* 373; *Douglas v. Wiggins*, 1 Johns. (N. Y.) Ch. 435; *Story's Eq. Jur.*, sec. 913.

⁵ *Brock v. Dole*, 66 Wis. 142. See also *Middlebrook v. Corwin*, 15 Wend.

The court will award a perpetual injunction to restrain waste by the plowing, burning, breaking, or sowing down of land.¹ But an injunction was refused to restrain a lessee from plowing pasture lands which had remained unplowed during the continuance of the lease, for thirty years, but had been plowed within six years prior to its commencement.² In all cases of waste it is the business of the reversioner to apply to the court promptly.³

§ 246. **Title of Complainant.** — The court will not grant a perpetual injunction to stay waste without positive evidence of title.⁴ But the court will, at the instance of a person merely alleging a legal title to realty, and before answer, grant an injunction to restrain persons in possession of an estate from committing malicious and destructive waste.⁵ Such a case must be clearly made out, and a mere general allegation that the tenant has cut down a considerable quantity of timber, some of which was of an ornamental character, and other portions of which were unripe for cutting, is insufficient. The authorities as to the jurisdiction of the court to interfere at the instance of parties claiming real property under a legal title prior to the establishment of their rights at law, by appointing a receiver of the rents and profits

(N. Y.) 169; *Daniels v. Pond*, 21 Pick. (Mass.) 367; *Davenport v. Magoon*, 13 Oregon, 3; s. c. 57 Am. Rep. 1; *Gallagher v. Shipley*, 24 Md. 427; *Lewis v. Lyman*, 22 Pick. (Mass.) 437.

¹ *Worsley v. Stuart*, 4 Bro. P. C. 377. See also *Brown v. Solary*, (Fla.) 19 So. 161, where it was held that the mining and taking of phosphate rock, from the soil of land valuable chiefly on account of the phosphate, amounts to a destruction of the estate in the character in which it has been enjoyed, and the injury resulting therefrom is of such an irreparable nature as to authorize a court of equity to enjoin it, on proper bill by the real owner.

² *Goring v. Goring*, 3 Sim. 661.

³ *Barry v. Barry*, 1 Jac. & W. 651.

⁴ *Doois v. Leo*, 6 Ves. 784. See *New England Engineering Co. v. Oakwood St. Ry. Co.* (C. C.) 71 F. 52. Where a party who is not the legal owner of land, brings a suit in which he demands a recovery of the land in controversy and of the damages sustained from the acts of waste complained of, and asks a temporary injunction to stay the waste until the further order of court, he will not be entitled to maintain the action, and therefore the prayer for a temporary injunction should be refused. *Gillett v. Treganza*, 13 Wis. 472. That one who claims an exclusive right to mine on a tract of land, by virtue of an alleged parol lease, and seeks a perpetual injunction restraining others from mining thereon, though the latter do not interfere with his development of his own range, must establish such right by clear and satisfactory evidence, see *Clegg v. Jones*, 43 Wis. 482.

⁵ *Ritter v. Ulman*, 78 F. 222; 24 C. C. A. 71. Compare *Allen v. Dunlap*, (Or.) 83 P. 675.

and by injunction to restrain waste, establish these propositions: First. In the absence of fraud, and where there is no privity between the parties, the court will not interfere, at the instance of a person so claiming, to grant a receiver against parties in possession. Secondly. Nor will it interfere, at the like instance, to restrain waste, except malicious or destructive waste, e. g., by pulling down the buildings, stripping the estate of its timber, or other like acts which no owner would do, or which would destroy the property before they could be arrested at law. Thirdly. But flagrant acts of this exceptional character would, at the present day, be restrained, and that before judgment at law, and notwithstanding plaintiff be out of possession, and his title denied on oath by the defendant.¹ Originally, interference was confined to cases founded in privity of title, and it was said that for the plaintiff to state a case in which the defendant was alleged to deny plaintiff's title, and claim under an adverse right, was for plaintiff to state himself out of court. But the courts have in more recent times, by insensible degrees, so enlarged the jurisdiction as to reach cases of adverse claims and rights not founded in privity. The advance to the new ground of jurisdiction was accomplished in England in a series of decisions culminating in the case of *Talbot v. Scott*,² in which former decisions were reviewed at length and learnedly discussed by the Vice-Chancellor.

The court will grant an injunction to stay waste in favor of an infant *en ventre sa mere*.³ An injunction may be granted in a clear case where the estate of the plaintiff is purely equitable.⁴ And since the remedy by injunction is applicable to every species

¹ See *Talbot v. Scott*, 4 K. & J. 96; 4 Jur. n. s. 1172. As to when an injunction will issue to protect the interest of remaindermen from waste by a trustee, see *Keaton v. Baggs*, 53 Ga. 227.

² 4 Kay & J. 96; *Haigh v. Jagger*, 2 Coll. 231. See also *Neale v. Crippa*, 4 K. & J. 472. "The jurisdiction of the court in cases of injunction originally, no doubt, arose in cases of waste, where there was privity between the parties. All the earlier cases are of that description." *Davenport v. Davenport*, 7 Hare, 217.

³ *Wallis v. Hodson*, 2 Atk. 117; *Robinson v. Litton*, 3 Atk. 211; *Musgrave v. Perry*, 2 Vern. 710; *Lutterel's Case*, cited in *Hale v. Hale*, Prec. Ch. 50.

⁴ *Smith's Appeal*, 69 Pa. St. 474; *Cooper v. Davis*, 15 Conn. 556; *McCaslin v. State*, 44 Ind. 151; *Brashear v. Marcey*, 3 J. J. Marsh. (Ky.) 89; *Gunby v. Thompson*, 56 Ga. 316; *Nelson v. Pinnegar*, 30 Ill. 473; *Bunker v. Locke*, 15 Wis. 653; *Robinson v. Russell*, 24 Cal. 467; *Nethery v. Payne*, 71 Ga. 374; *State v. North, etc. R. Co.*, 18 Md. 193; *Smith v. Price*, 39 Ill. 28.

of waste, it lies by one tenant in common against another.¹ But an injunction will not lie at the suit of a widow to restrain a sale of lands, subject to her dower, nor to restrain the purchasers from committing waste on the dower lands.²

§ 247. **Title in Dispute.** — Where the defendant claims both the title and the possession, the court will be reluctant to grant an injunction even against the cutting of timber, though it constitute the chief value of the premises. An injunction was refused under such circumstances when the defendant's title had been recognized by the complainant,³ and a person in possession of lands under claim and color of title should not be enjoined from occupying and erecting buildings on the lands, at the suit of one who claims to be the true owner, until the title of the latter has been judicially ascertained; but only from acts which tend to destroy the substance of the estate, such as digging and removing ores, or coals, cutting timber, and the like.⁴ Notwithstanding the denial of the title, an injunction may issue to stay irreparable waste.⁵ But where the title is involved in litigation in which the party in possession sets up title adverse to that of the plaintiff, an injunction will not be granted to stay permissive waste, or waste which is not destructive and irreparable in its nature.⁶ An

¹ *Hawley v. Clowe*, 2 Johns. Ch. (N. Y.) 122. By Stat. 13 Edw. I. ch. 22, an action of waste was given at law between tenants in common.

² *Palmer v. Casperson*, 17 N. J. Eq. 204.

³ *Shreve v. Black*, 3 Green Ch. 177. In this case, Pennington, Chancellor, said: "My embarrassment is not so much about the title as about the possession. When this is claimed by the defendant, as well as the title, and that too, in connection with the title, what right has the court to interfere? To enjoin both parties until a trial is had must result in tying up all unimproved lands, about which there is any dispute, from being enjoyed by their owners."

⁴ *Leroy v. Wright*, 4 Sawyer, 530.

⁵ *United States v. Parrott*, 1 McAll. 271; *Cornelius v. Post*, 9 N. J. Eq. (1 Stock.) 196.

CLAIM UNDER PATENT. — In 1844, H. took possession of land under a patent and held exclusive possession thereof, and paid the taxes for more than the statutory period, the county record showing no other claim to the land. In 1882, after the land had been purchased and paid for at a judicial sale from H., defendant entered forcibly under claim of title under an older patent, and committed waste thereon. *Held*, that the purchaser was entitled to a perpetual injunction restraining waste. *Basore v. Henkle*, 82 Va. 474.

⁶ *Pillsworth v. Hopton*, 6 Ves.; *Talbot v. Hope Scott*, 4 Kay & J. 96; *Poindexter v. Henderson*, Walk. (Miss.) 177; *Storm v. Mann*, 4 Johns. (N. Y.) Ch. 21; *Nevitt v. Gillespie*, 1 How. (Miss.) 108; *Lansing v. North River, etc. Co.*, 7 Johns. Ch. (N. Y.) 164; *Nethery v. Payne*, 71 Ga. 374; *Kellar v. Bullington*, (Ala.) 14 So. 466. Compare *Shubrick v. Guerard*, 2 Desaus. (S.

injunction will be granted, however, to restrain waste or substantial or injurious change in the condition of the property, the title or possession of which is the subject of litigation.¹ And a bill for a special injunction to restrain a party in possession and claiming adversely, from cutting timber, must not only set forth that the threatened injury would be irreparable, but must also state how it would be so, that the court may see clearly that such would be the result.² But where the only dispute is as to the proper construction of a deed the court of equity will determine that dispute.³

§ 248. **Same — Solvency of Defendant; Contest pending in Government Land-office.** — The court will not interfere to stay waste in cutting timber where the plaintiff, by his own showing, has prosecuted several suits against one of the defendants, for cutting timber on the same land, and has never succeeded in obtaining the verdict of a jury or the judgment of a court, and has himself been prosecuted by some of the defendants for a trespass on the land, and a verdict rendered against him, the complainant not alleging that any of the defendants are insolvent, or unable to respond to any amount of damages he may have sustained.⁴ And prescriptive title in the defendant in possession will defeat an application for an injunction against him to restrain waste; especially when complainant's title is not free from doubt.⁵ A

Car.) Eq. 616; *Cornelius v. Post*, 1 Stock. (N. J.) 196; *City of Philadelphia v. Griscom*, 5 Phil. (Pa.) 532.

¹ *Snyder v. Hopkins*, 31 Kan. 557; *Akrill v. Selden*, 1 Barb. (N. Y.) 316; *Seymour v. Morgan*, 45 Ga. 201; *People v. Simonson*, 10 Mich. 335; *Baldwin v. York*, 71 N. Car. 329; *Felton v. Justice*, 51 Cal. 529; *Crown v. Leonard*, 32 Ga. 241; *Ex parte Foster*, 11 Ark. 304; *Chesapeake, etc. Co. v. Young*, 3 Md. 480; *Buskirk v. King*, 72 F. 22; 18 C. C. A. 418; *Ulman v. Ritter*, (C. C.) 72 F. 1000.

² *Thompson v. Williams*, 1 Jones (N. C.) Eq. 176. A bill for an injunction to stay destructive waste cannot be sustained against one in exclusive possession, claiming, colorably, the absolute estate, where no action at law has been brought and none is contemplated. *Bogey v. Shute*, 4 Jones (N. C.) Eq. 174.

³ *Jennings Bros. & Co. v. Beale*, (Pa. Sup.) 27 A. 948; 158 Pa. St. 283; *St. Louis Min. & Mill. Co. v. Montana Min. Co.*, (C. C.) 58 F. 129. See also *Manning v. Ogden*, 70 Hun, 399; *Andrews v. Murray*, 85 Iowa, 736; *Wadsworth v. Goree*, 96 Ala. 227.

⁴ *West v. Page*, 9 N. J. Eq. (1 Stock.) 119; *Smith v. Wilson*, 10 Cal. 528; *Nethery v. Payne*, 71 Ga. 374.

⁵ *Nethery v. Payne*, 71 Ga. 372; *Whitelegg v. Whitelegg*, 1 Bro. C. C. 58; *Lowe v. Lucy*, 1 Ir. Eq. 98.

bill for an injunction against waste, which shows that the plaintiff is an applicant to purchase the premises from the United States as mineral land ; that his right to do so is being contested in the United States land-office ; and that the defendants claim title adversely to him, — does not state a case within any known exception to the general rule, that equity will not interfere by injunction to prevent waste when the complainant's title is disputed.¹

§ 249. **Remedy at Law.** — Waste being usually considered in its very nature an irreparable wrong, the mere fact that an action at law is given is not alone sufficient to oust a court of equity of its jurisdiction.² And relief will be given, although defendant holds under a lease containing a covenant fixing a penalty for a specified form of waste where it is apparent that the amount agreed upon is entirely inadequate. Thus, where a lease contained a covenant against plowing or digging up any part of the demised premises, and in case the lessee should do so, that he should pay the sum of £5 for every cart of clay or sand which he should dig up, and also £5 in addition to the rent for every acre, so long as any part thereof should continue to be broken or plowed up, the court held, that the sum mentioned in the covenant being disproportioned to the damage contemplated was in the nature of a penalty, and not of liquidated damages, and that the court could interfere to restrain by injunction the lessee from violating the covenant.³ But the court refused to interfere by way of injunction, to stay waste, in a case where the defendant was a mere stranger guilty of forcible entry, and might be turned out of possession immediately.⁴

§ 250. **Injunction refused where Legal Remedy is adequate.** — It is not to be understood that injunction will be granted in all cases of waste, regardless of the fact that a proceeding at law may be instituted for the same cause. Where an adequate legal remedy may be found, equitable relief will be refused here as in other

¹ *McBride v. Board of Com'rs*, 44 F. 17.

² *Cooper v. Cooper*, 5 N. J. Eq. (1 Halst.) 9. In this case an injunction had been granted, restraining a defendant from cutting timber on the plaintiff's land, and the defendant, in his answer, insisted that he had the right to cut the timber, but it appeared from the bill and answer that he had no such right. The injunction was continued, notwithstanding the plaintiff had a remedy at law.

³ *Burne v. Madden*, Ll. & G. tem. Plunk. 493.

⁴ *Mortimer v. Cotterell*, 2 Cox, 205.

cases. Thus, injunction will not lie against a temporary administrator to prevent the commission of waste upon the ground of the insolvency of his surety, when he may be compelled by a proper proceeding at law to give additional security.¹

§ 251. **Cutting Timber.** — By far the most frequent instance of waste consists in the cutting of growing timber.² It is obvious that whether growing trees be adapted to the uses of husbandry, or kept and cultivated for ornament, they constitute an important item of value of the inheritance; therefore courts are extremely liberal in granting preventive relief against this form of wrong, especially when shown to be wanton and malicious, viewing it as a rule, as irreparable in its very nature, and incapable of being estimated, and adequately compensated for in any action at law. Owing to differences in the customs and usages appertaining to titles and tenures, and somewhat to traditions of feudalism which, notwithstanding many assertions to the contrary, still have an influence upon English land law, many acts which would amount to this species of waste in England would not be so considered here. There are no rigid rules in this country by which to determine what constitutes waste, it being a question in each particular case proper for a jury to determine.³ Acts which would result in

¹ *Montgomery v. Walker*, 36 Ga. 515.

² *Natoma, etc. Co. v. Clarkin*, 14 Cal. 544; *Tainter v. Mayor*, 19 N. J. Eq. 46; *De La Croix v. Villere*, 11 La. An. 39. The court will grant an injunction against cutting down saplings, wavers, and fruit-trees, *Kaye v. Banks*, Dick. 431; *Hole v. Thompson*, 7 Ves. 589; and hedges, except trees or shrubs that may be removed in the ordinary business of a nurseryman. *Little v. Thompson*, 2 Beav. 129; *Pentland v. Somervill*, 2 Ir. Ch. Rep. 289. And in *O'Brien v. O'Brien*, Amb. 107; 1 Bro. C. C. 168, n., the court granted an injunction to stay a tenant for life from committing waste by cutting trees growing for ornament, and saplings not proper to be felled. The court will restrain tenants for life, with impeachment for waste, to a reasonable exercise of the right. *Aston v. Aston*, 1 Ves. Sen. 264.

³ *Jackson v. Brownson*, 7 Johns. (N. Y.) 227. In this case Van Ness, J., delivering the opinion, said: "In England that species of wood which is denominated *timber* shall not be cut down, because felling it is considered as an injury done to the inheritance, and thereupon *waste*; here, from the different state of many parts of the country, *timber* may and must be cut down to a certain extent, but not so as to cause an irreparable injury to the reversioner. To what extent wood may be cut before the tenant is guilty of waste must be left to the sound discretion of a jury under the direction of the court as in other cases." See also *Jackson v. Tibbitts*, 3 Wend. (N. Y.) 341; *Crockett v. Crockett*, 2 Ohio St. 180; *Pyncheon v. Stearns*, 11 Met. (Mass.) 304; *Kidd v. Dennison*, 6 Barb. (N. Y.) 9; *Keeler v. Eastman*, 11 Vt. 293; *Drown v. Smith*, 25 Me. 143; *Lyman's Appeal*, 31 Pa. St. 46. In England, the cutting down de-

the destruction of all the timber on a man's home plantation, where wood and timber are necessary to the enjoyment of the property in that character, are clearly sufficient to authorize an injunction to restrain the cutting of such wood and timber.¹ But the mere allegation that the defendant is felling timber of the complainant, is not enough, without further averment as to some peculiar value of the timber for some particular purpose, to warrant an injunction to restrain the defendant.² And even in England, on a mortgage of wood and underwood, it is not waste by the mortgagor in possession to cut underwood at seasonable times and of proper growth; but he being a bankrupt, an injunction was granted on the right of the mortgagee to have the estate sold in the plight in which it was at bankruptcy, and to prove the rest of his debt.³ The court, having jurisdiction to enjoin, will decree an account and satisfaction for what has already been cut.⁴

§ 252. **Same — Compelling Timber to be felled.** — The jurisdiction to restrain permissive as well as positive or active waste will be exercised sometimes to compel the felling of timber by the tenant in possession. For instance, equity will in any proper case interfere in cases where the tenant in possession is impeachable for waste, and direct timber to be felled which is fit to be cut down and in danger of running into decay, and will thus secure the proceeds for the benefit of those entitled.⁵

§ 253. **Timber planted for Ornament.** — And a tenant for life without impeachment will be restrained from cutting timber planted or left standing for ornament, etc., whether ornamental or not so, and the principle has been extended beyond the mansion-house to out-houses and grounds, plantations, vistas, avenues, and all the rides about the estate, for ten miles around.⁶ And the

cayed timber is as much waste as cutting down any other. *Parrot v. Parrot*, 3 Atk. 95. But if a tenant for life liable to waste sell timber, he cannot prevent the vendee from cutting it. *Wentworth v. Turner*, 3 Ves. 3.

¹ *Davis v. Reed*, 14 Md. 152.

² *Hatcher v. Hampton*, 7 Ga. 49.

³ *Hampton v. Hodges*, 8 Ves. 105.

⁴ *Fleming v. Collins*, 2 Del. Ch. 230.

⁵ See *Eden on Injunct.* ch. 10, pp. 218 to 221; *Burges v. Lamb*, 16 Ves. 182; *Mildmay v. Mildmay*, 4 Bro. Ch. 76; *Delapole v. Delapole*, 17 Ves. 150; *Osborne v. Osborne*, cited 19 Ves. 428; *Wickham v. Wickham*, 19 Ves. 419, 423; *Cooper*, 288.

⁶ *Devonshire (Marquis of) v. Sandys*, 6 Ves. 107, 110.

court extends its jurisdiction, granting an injunction against cutting ornamental timber, upon the principle of equitable waste, to trees planted for the purpose of excluding objects from view.¹ But in the preservation of ornamental timber the protection of the court is confined to timber planted and left standing for shelter or ornament, and the question whether the protection should be extended to particular timber is therefore one of fact, and the determination must depend upon the evidence which can be collected to establish the fact.² Trustees in whom an estate is vested ought not to cut down ornamental trees alleged to be prejudicial, without first applying to the parties beneficially interested for their assent, or to the court for its authority, the onus of showing that the trees are prejudicial resting on the trustees; and a perpetual injunction was granted against trustees who had cut down three ornamental trees, and failed in proving to the satisfaction of the court that they were prejudicial to the residence.³

§ 254. **Removal of Timber already cut.** — Though equity will not sustain a bill filed solely to prevent the removal of timber wrongfully cut, or for an account of past waste, there being a complete remedy at law; yet when the bill is so filed to prevent future waste, to avoid multiplicity of suits the court will allow an account of, and satisfaction for what has been done, and for the purpose of preventing irreparable mischief will enjoin removal of the timber.⁴ In an action by the reversioner against the tenant in possession for waste for cutting timber, it may be questionable whether an injunction is proper as to timber already

¹ *Day v. Merry*, 16 Ves. 375, where Lord Eldon said "that he had no doubt a tenant for life might have an injunction, particularly as to ornamental timber, for that was not so much upon his interest as his enjoyment." And again in *Coffin v. Coffin*, Id. 70, 71, "The court does not protect timber because it is ornamental, but it protects it if it was planted for ornament, whether it is or is not ornamental." The court will restrain cutting underwood of insufficient growth. *Brydges v. Stephens*, 6 Madd. 279.

² *Marker v. Marker*, 9 Hare, 1, 18; 15 Jur. 663.

³ *Campbell v. Allgood*, 17 Beav. 623.

⁴ *Spear v. Cutter*, 5 Barb. 486; *Hilliard Inj.* 324, 331; *United States v. Parrott*, 1 McAll. (C. C.) 271. "The right to an account for waste already committed is incidental to the right to file a bill to prevent further waste, though no bill will lie merely for an account for waste done, because the plaintiff had an ample remedy at law." Per Bell, C. J., *Dennett v. Dennett*, 43 N. H. 503. In an Anonymous Case, 1 Ves. Jr. 93, the court made an order to prevent the removal of timber wrongfully cut.

cut;¹ but the court having acquired jurisdiction, may require the defendant to give security to account, as a condition of modifying the injunction in this respect.² And a vendor who has removed trees from land sold by him, and who without just grounds claims the right to do so under a verbal reservation at the time of making the deed, will be enjoined from removing others.³ But a tenant for life will not be enjoined from removing the property, or compelled to give security for its forthcoming, unless good grounds are shown that it is in danger of being removed beyond the jurisdiction of the court.⁴

§ 255. **Waste on Mining Property.** — The chief value of mining property is destroyed by the extraction and removal of minerals therefrom. Injury to such property usually takes the form of trespass, for which an action lies, and preventive relief will be granted to prevent its repetition or continuance;⁵ yet in many cases the wrong for which an injunction is sought constitutes

¹ In *Watson v. Hunter*, 5 Johns. Ch. 169, where the complainant sought to restrain a tenant for years from cutting pine timber on the premises leased and the removal of that already cut, Chancellor Kent, denying the relief, said: "This court will stay the commission of waste, or the transfer of negotiable paper, in certain cases, in order to prevent irreparable mischief, but the only mischief that can arise in the present case, as to the timber already cut and drawn to the mills of the defendants, is the possible inability of the party to respond in damages. That is a danger equally applicable to all other ordinary demands, and it is not an impending and special mischief, which will justify this extraordinary preventive remedy by injunction. If the injunction could be ordinarily applied to waste already committed, I apprehend we should very rarely hear of a special action on the case, in the nature of the waste, in the courts of common law. . . . Where the mischief would be irreparable it might be necessary to interfere in this extraordinary way, and prevent the removal of the timber. I do not mean to be understood to say that the court will never interfere, but that it ought not to be done in ordinary cases like the present." Citing *Smith v. Cooke*, 3 Atk. 381; *Lee v. Alston*, 1 Ves. Jr. 78; *Garth v. Cotton*, 1 Ves. 528; *Bishop of London v. Webb*, 1 P. Wms. 526; *Packington v. Packington*, 3 Atk. 215.

² *Weatherby v. Wood*, 29 How. (N. Y.) Pr. 404.

³ *Smith v. Price*, 39 Ill. 28.

⁴ *Claggon v. Veasey*, 7 Ired. (N. C.) Eq. 175; *Mercer v. Byrd*, 4 Jones (N. C.) Eq. 358.

⁵ *Infra*, § 363. So the lessee of a mine may be enjoined from removing the pillars which support the surface. *Thomas Iron Co. v. Allentown Mining Co.*, 23 N. J. Eq. 77. But equity will not, except under peculiar circumstances, restrain the working of mines the title to which is in dispute, until the title is settled at law. *Irwin v. Davidson*, 3 Ired. (N. C.) Eq. 311; *Powers v. Heery*, R. M. Charl. (Ga.) 523; *Paris v. Berry*, 2 J. J. Marsh. (Ky.) 483; *Lining v. Geddes*, 1 McCord (S. C.) Ch. 304; *Nevitt v. Gillespie*, 2 Miss. (1 How.) 108.

waste, and relief will be granted to restrain it as in other cases of irreparable injury to the reversion. And an injunction will be granted to prevent removal of mineral deposits by the tenant in possession, though the same be not mining property. Thus a perpetual injunction was granted to restrain the tenant of a farm, in part of which was a pool through which ran a stream from the mountains depositing in its passage mineral substances, from "taking and carrying away from and out of the bed and bottom of the pool, or any part thereof, any soil, oxide of iron, ochre, slime, deposit, or any other mineral substances; and from puddling, loosening, disturbing, and floating, and from causing to be puddled, loosened, disturbed, or floated off, any soil, oxide of iron, ochre, slime, deposits, or mineral substances already deposited, or thereafter to be deposited, upon the bed of the said pool."¹ But in this class of cases courts of equity will not decree an accounting where the account is a mere matter of charge for a certain number of tons of ore, with no entries on the other side. This is clearly the subject of an action of assumpsit at law.²

§ 256. **Threatened Waste.** — It would be absurd if a party were compelled to stand by until the injury has been accomplished before applying for preventive relief in cases of this nature. Courts of equity grant relief upon proper showing to prevent threatened waste without waiting for its actual commission.³

¹ *Thomas v. Jones*, 1 Y. & C. (Ch.) 510. See also *Liaret v. Johnson*, 1 Y. & C. (Ch.) 527.

² *Grubb's Appeal*, 90 Pa. St. 228, also holding that a person who is not a tenant in possession, but possesses a right to dig ore, is not guilty of committing a waste or trespass when he takes out more ore than his contract or right calls for, and a court of equity cannot restrain him by injunction. It is a question of degree, to be established by evidence, whether or not the working of a dormant or abandoned mine by a tenant for life is waste. *Bagot v. Bagot*, 32 Beav. 509; *Legge v. Legge*, Id.

³ *Sheridan v. McMullen*, 12 Or. 150; *Rodgers v. Rodgers*, 11 Barb. (N. Y.) 595; *More v. Massini*, 32 Cal. 590; *Duvall v. Waters*, 1 Bland (Md.), 569; *London v. Warfield*, 5 J. J. Marsh. (Ky.) 196; *White Water, etc. Co. v. Comegys*, 2 Ind. 469; *Campbell v. Allgood*, 17 Beav. 628; *Gibson v. Smith*, 2 Atk. 182.

THREAT TO OPEN MINES. — In *Gibson v. Smith*, 2 Atk. 182, it was held by Lord Chancellor Hardwicke, that if a person has only threatened to open mines, a plaintiff may certainly come into court to restrain a defendant from doing it, and that it is not necessary to stay till waste is actually committed, where the intention appears, and the person insists on his right to do it, and though no proof appears of waste, yet if a tenant for life insists on a right to do it, and has none, the reversioner may have an injunction.

Therefore it is sufficient, on demurrer, to sustain a bill for injunction to stay waste and prevent the removal of improvements, that the bill alleges that complainant is the owner and is entitled to possession of the premises with the improvements, and that defendants are in possession and threaten to destroy the improvements, and are insolvent and unable to respond in pecuniary damages.¹

§ 257. **Equitable Waste.** — Equitable waste is defined by Lord Chancellor Campbell to be “that which a prudent man would not do in the management of his own property.”² The court by applying the doctrine of equitable waste controls and restrains the excessive use of the legal power incident to an estate impeachable for waste, but with reference only to the presumed will and intention of the party by whom the power was created.³ The court may interfere where a man unconscientiously exercises a legal right to the prejudice of another; and an act may, in some sense, be regarded as unconscientious if contrary to the dictates of prudence and reason, although the actor does the act without any malicious motive.⁴ The doctrine applies equally to all cases of estates limited to go in a course of succession, whether that object is effected by creating life interests, or estates in fee with executory devises over.⁵

§ 258. **Pending Litigation.** — The earliest exercise of the jurisdiction to restrain waste of which any record can be found, was with a view to preserve the estate *pendente lite*.⁶ The remedy is still freely employed where necessary to prevent irremediable

¹ Frank v. Brunneman, 8 W. Va. 462.

² Turner v. Wright, 6 Jur. n. s. 647; 29 L. J. (Ch.) 470. In equitable, as in legal waste, if one act of waste be established, the court will restrain equitable waste generally. Coffin v. Coffin, 6 Madd. 117. And a small degree of waste manifesting to do more is sufficient for the court to act upon. Barry v. Barry, 1 Jac. & W. 651.

³ Marker v. Marker, 9 Hare, 1, 18; 15 Jur. 668.

⁴ Turner v. Wright, 6 Jur. n. s. 809. In this case Bruce, L. J., said: “The presence or absence of a bad motive will not enable us to draw any satisfactory line between what is to be considered malicious and what is to be considered equitable waste; and no line to regulate the interposition of a court of equity by injunction can well be drawn, other than the recognized and well established line between legal and equitable waste. The application of this to the facts of particular cases may sometimes be attended with difficulty, but the principle on which the line is to be traced is known and unvariable.”

⁵ Turner v. Wright, 6 Jur. n. s. 809.

⁶ *Supra*, § 240.

mischief going to the destruction of the substance of an estate in litigation, by the person in possession.¹ Equity will interfere pending an action in ejectment to restrain the cutting of timber, the quarrying of rock, or any other act amounting to waste by the tenant in possession, but not to disturb the possession or prevent the occupant from the customary use of the premises or the full beneficial enjoyment of all the profits and advantages of possession;² but it was refused where no ejectment had been brought.³ And it will generally be necessary for the plaintiff to show that by reason of the character of the act or the insolvency of the defendant, or for other reason, an action at law would not afford adequate relief. Thus, where the plaintiff claiming the ownership of certain land, brings an action to recover the same, and (as auxiliary to the main relief) seeks to enjoin the defendant in possession from cutting timber and turpentine trees thereon for buildings and fencing, he must show the defendant's inability to respond in damages for such injury.⁴

§ 259. **Pending Appeal.** — After a temporary injunction against the commission of waste has been granted pending the bringing of an action at law to settle the legal rights of the parties, if upon the trial the defendant obtains judgment, it is discretionary with the court whether it will dissolve or retain the injunction pending a writ of error to the judgment at law. The court should in such case balance the relative inconvenience and damage to the parties.⁵

§ 260. **Waste in Park; Keeping up Herd of Deer.** — A landowner adjoining a tract dedicated as a public park by defendants,

¹ *Erhardt v. Boaro*, 113 U. S. 537. See *Brown v. Folwell*, 3 Halst. Ch. (N. J.) 593; *Thompson v. Williams*, 1 Jones (N. C.) Eq. 176; *Storm v. Mann*, 4 Johns. (N. Y.) Ch. 21; *Manning v. Ogden*, (Sup.) 24 N. Y. S. 70; *Snyder v. Hopkins*, 31 Kan. 557.

² *Snyder v. Hopkins*, 31 Kan. 557. See *Kulp v. Bowen*, (Pa.) 15 A. 717; *Erhardt v. Boaro*, 113 U. S. 537, removal of ore.

PENDING PROBATE OF WILL. — An injunction will lie in behalf of a devisee, and against the son of the testator, on the showing that the son is collecting the rents of the estate pending the question of the probate of the testator's will, and that waste is being committed by him. *Piatt v. Piatt*, 2 Disney (Ohio), 408.

³ *Lathropp v. Marsh*, 5 Ves. 259.

⁴ *McCormick v. Nixon*, 83 N. C. 113.

⁵ *Mountcashell v. O'Neill*, 3 Ir. Ch. 619; *Woods v. Riley*, (Miss.) 18 So. 884; 72 Miss. 78.

giving by deed from them "the free use and enjoyment of the park in common with other lots," and the privilege "to have and use a carriage-way . . . into and through the park," may enjoin them from opening a highway across the park, from destroying the trees and shrubbery therein, and from laying it out into building lots.¹

Deer in a park, when reclaimed, are personal chattels, and cease to be part of the inheritance, and the court will not restrain waste in not keeping up the herd; and therefore, in a suit by incumbrancer of a tenant for life of a deer-park and other property, an application by a remainderman to prevent the receiver from letting the park except as a deer-park, and with proper covenants for preserving the deer, was refused.²

§ 261. **On Government Land.** — When the government finds persons in possession of the public domain, under claim or color of title, it can proceed by injunction to restrain an improper use of the same, without first determining the rights of the parties in a court of law.³

§ 262. **Waste by Lessee.** — It may be stated upon the current of American authority, that the ancient doctrine of the common law in relation to waste has been relaxed in favor of modern tenancies; particularly as to buildings erected for purposes of trade and manufactures. It has been held not to be waste for the tenant to erect a new edifice upon the demised premises when it could be done without destroying or materially injuring the buildings or other property already existing thereon.⁴ But

¹ *Morris v. Sea Girt Land Improvement Co.*, 38 N. J. Eq. 304. A purchaser of a lot of land in Lewellyn Park — a tract of land owned and managed by a number of associates — enjoined from blasting stone upon his lot for any purpose of removing the same for sale, but allowed to blast so far as might be necessary to enable him to clear and grade his lot for the purpose of building. *Haskell v. Wright*, 23 N. J. Eq. 389.

² *Ford v. Tynte*, 2 J. & H. 150; 31 L. J. (Ch.) 177. In this case the court stated the evidence upon which deer in a park will be considered tame.

³ *United States v. Cleveland & Colo. Cattle Co.*, 33 F. 323.

⁴ *Winship v. Pilts*, 3 Paige (N. Y.), 259.

USE OF PROPERTY BY LANDLORD. — Laws N. Y. 1885, ch. 342, § 1, provides that a mechanic shall have a lien only on the "interest in land" of the party for whom work is done, "whether owner in fee or of a less estate, or whether lessee for a term of years," etc. Plaintiff fitted certain buildings of defendant in the possession of leasehold tenants, with steam boilers and piping, and then claimed a lien, under the statute, on the tenant's estate in the premises. The tenants abandoned and surrendered their lease, and the defendant entered. *Held*, that an injunction should not be granted to restrain

the authorities are in hopeless conflict on this question, some states adhering to the common-law rule that any alterations by tenants constitute restrainable waste whether damage can be shown or not, and although such alteration improves the value of the premises, where made contrary to the will of the landlord or contrary to the terms of the covenants.¹ There is no conflict, however, on the proposition that where a tenant is about to commit an act which will operate as a permanent injury to the estate, the court will interfere and restrain him from doing such act, upon a bill by the landlord showing such to be the intention on the part of the tenant.² Thus an injunction will be granted at the instance of a landlord to enjoin a threatened removal by the tenant of a house from the demised premises;³ to restrain the sowing an entire farm to wheat, contrary to a covenant, whereby the farm is rendered practically worthless for the coming season.⁴ So where a lessee began to pull down and remove a brick building erected by him upon the demised premises, it was held that a suit to enjoin him from so doing was properly brought by the lessor, who might also recover therein damages claimed in his complaint.⁵

§ 268. **Merely Nominal Waste not enjoined.** — Where a lessee, bound by a covenant not to commit waste, has committed acts of waste, for which damage merely nominal would be given, the court of chancery will not entertain a suit against him, founded on these acts of waste, where it appears that he does not contemplate committing any further waste, or assert a right to commit it.⁶ Nor can the landlord restrain the tenant from removing a

the defendant owner of the fee from using the said boilers and pipes, because, if fixtures, they were not covered by the lien, and, if part of the realty, they were rightfully in his possession as landlord. *Chamberlin v. McCarthy*, 59 Hun, 138; 13 N. Y. S. 217.

¹ See *Kemp v. Sober*, 1 Sim. n. s. 520; *Tipping v. Eckersly*, 2 Kay & J. 264; *Perrine v. Marsden*, 34 Cal. 14.

² *Poertner v. Russell*, 33 Wis. 193; *McDaniel v. Callam*, 75 Ala. 827; *Brock v. Dole*, 66 Wis. 142.

³ *Dougherty v. Spencer*, 23 Ill. App. 357.

⁴ *Chapel v. Hill*, 60 Mich. 167; 26 N. W. 874, holding also that, if the tenant disregard the injunction, and proceeds to plow the land, the court has power to ascertain the amount of damages the lessor has suffered, and decree the payment. But where a lease required tenant to reduce to cultivation uncleared portions of the premises, his cutting down trees on those portions will not be enjoined as waste. *McDaniel v. Callam*, 75 Ala. 827.

⁵ *Jungerman v. Bovee*, 19 Cal. 354.

⁶ *Doran v. Carroll*, 11 Ir. Ch. Rep. 379.

building from the demised premises, to which it is not shown the former has the reversion.¹ In accordance with the same policy of non-interference unless substantial injury be shown, the court will not interfere to restrain waste by a sub-tenant at the instance of his immediate landlord, if it appear that the latter has obtained an indemnity against the claims of the head landlord;² nor if it appears that the security for the rent will thereby be merely impaired and lessened in value. It must be shown that such security will be left inadequate to secure the rent.³

§ 264. **Tenant for Life.** — A tenant for life *sans* waste will not be interfered with in the exercise of his legal powers unless he is proceeding to use these legal powers in a manner inequitable towards those in remainder; and therefore he may fell and sell trees planted for ornament, if done in a proper course of husbandry.⁴ Nor will the tenant in dower be enjoined from cutting timber to make rails to put the fences in repair, even though the timber on the farm is very scarce, for it is the duty and right of the life-tenant to reasonably use the timber for purposes of repair, and such use is no injury to the remainderman.⁵ But a tenant for life, without impeachment for waste, will be restrained by injunction from affecting the inheritance in an

¹ *Perrine v. Marsden*, 34 Cal. 14; *Estabrook v. Hughes*, 8 Neb. 496. A party praying for an injunction against a lessee for waste, alleging himself to be a purchaser from the lessor by deed, must exhibit his deed, and prove its execution, in order to obtain an injunction. *Loudon v. Warfield*, 5 J. J. Marsh. (Ky.) 196.

REMOVAL OF MILL; INSOLVENCY OF DEFENDANT. — A complaint showing that certain machinery belonging to plaintiff and part of his mill property was about to be taken down and removed by defendants (who were in possession of the premises as tenants), to the great and irreparable injury of plaintiff and his property, is sufficient to give the court jurisdiction to award an injunction, even without the further averment found in such complaint of defendant's insolvency. *Poertner v. Russell*, 33 Wis. 193.

² *Keogh v. Collins*, Kay & J. 805.

³ *Perrine v. Marsden*, 34 Cal. 14.

⁴ *Halliwell v. Philips*, 4 Jur. 607.

ESTATE SETTLED IN TRUST. — Where a tenant for life under a settlement without impeachment of waste, for valuable consideration had assigned to the trustees of the settlement "all and singular the timber and timber-like trees then growing and being, and which might thereafter grow and be, upon" the settled estate, the court held this included the "thinnings" of the woods, and that it rested solely with the trustees to determine what thinnings should be made, and at what time. *Gordon v. Woodford*, 6 Jur. n. s. 59.

⁵ *Calvert v. Rice*, (Ky.) 16 S. W. 351.

unreasonable and unconscientious manner. He may not wantonly cut timber left standing or planted for shelter or ornament; he may, however, cut down ordinary timber and convert it to his own use.¹ Devisees having a life-interest in land, with a possibility of shares in the fee, may be enjoined from committing waste.²

§ 265. **Neither Smallness nor Remoteness of Interest material.** — It is not necessary that the complainant should show himself entitled to the entire reversion, or even that he has a vested estate in remainder. Thus, it was held that a court of equity would, at the suit of a joint owner of the reversion of premises leased for a term of 95 years, upon final hearing, perpetually enjoin the lessee, who had purchased in four-fifths of the reversion, from building upon, or over, or closing up, or incumbering, contrary to a stipulation in the lease, a private gangway laid out between, and for the benefit of the demised premises and an estate adjoining owned by the lessee; and this without regard to the use or value of the gangway, or to the comparative advantage of the plaintiff and disadvantage of the defendant consequent upon the injunction.³ And a contingent remainderman may sue for an injunction to restrain waste by the life-tenant.⁴ And where a testator devised land to his daughter, provided she should have lawful issue, and there was a remainder over in the fee, the devisee taking a life-estate subject to the fee on birth of such issue, the remainderman, until issue born, was held to have such an interest in the estate as would sustain an injunction to restrain the devisee for life from committing unauthorized waste.⁵

§ 266. **In Favor of Mortgagees.** — A mortgagee is entitled to an injunction against threatened waste by a mortgagor in possession which involves irreparable injury to the land, and will render the security inadequate; and the mortgagee is entitled to an injunction against such waste, without averring or proving that the mortgagor is insolvent.⁶ Upon his application, and

¹ *Clement v. Wheeler*, 25 N. H. (5 Fost.) 361.

² *Farabow v. Green*, (N. C.) 12 S. E. 1003.

³ *Beckwith v. Howard*, 6 R. I. 1. See *McCord v. Iker*, 12 Ohio, 387.

⁴ *University v. Tucker*, 31 W. Va. 621; 8 S. E. 410.

⁵ *Cowand v. Meyers*, 99 N. C. 198; 6 S. E. 82.

⁶ *Fairbank v. Cudworth*, 33 Wis. 358; *Rawlings v. Stewart*, 1 Bland (Md.) 17; *Brown v. Stewart*, 1 Md. Ch. 87; *Robinson v. Russell*, 24 Cal. 467; *Down-*

upon a proper showing, an injunction may be granted at the suit of a mortgagee, to prevent the removal from the mortgaged premises of timber trees, cut down in waste of the security before service of the injunction, where the person against whom relief must be sought for the waste committed is insolvent, or where no redress can be obtained at law or in equity if the removal is permitted, or where there is fraud. But where the bill alleges neither of such considerations, and merely prays an accounting from the person who has committed the waste, an injunction will not be granted.¹ Nor will waste by a mortgagor in possession be enjoined, unless the acts complained of may so impair the value of the property as to render it insufficient, or of doubtful sufficiency, as security for the debt. The value of the property should, however, remain largely in excess of the debt secured by it.² A mortgagor in possession committing waste after a degree of foreclosure has been rendered, but before it has been executed, may be restrained by injunction.³

ing v. Palmeteer, 1 Mon. (Ky.) 64; *Nelson v. Pinegar*, 30 Ill. 478; *Youle v. Richards*, 1 N. J. Eq. (Sax.) 534; *Smith v. Moore*, 11 N. H. 55; *Irwin v. Davidson*, 3 Ired. Eq. (N. C.) 811; *Parsons v. Hughes*, 12 Md. 1; *Moulton v. Stowell*, 16 N. H. 221; *Ensign v. Colburn*, 11 Paige (N. Y.), 503; *Hastings v. Perry*, 20 Vt. 272; *Core v. Bell*, 20 W. Va. 169; *Scott v. Wharton*, 2 Hen. & M. (Va.) 25. Restraining waste to preserve security for taxes, see *Caldwell v. Ward*, (Mich.) 50 N. W. 303, explaining s. c. 83 Mich. 13; 46 N. W. 1024. Under Pub. Acts 1889, act 223, providing that a township treasurer "shall be entitled to an injunction to restrain waste" on land chiefly valuable for its timber, when its owner neglects or refuses to pay any tax assessed thereon, it is no defence that the tax can be collected by other process; that the owner does not intend to commit waste; and that should waste be committed, the land would still be of sufficient value to pay the tax. *Rossman v. Adams*, (Mich.) 51 N. W. 685.

¹ *Bank of Chenango v. Cox*, 26 N. J. Eq. 452. A mortgagee of an undivided interest in land is not entitled to an injunction restraining the tenants in common in possession of the land from removing the clay deposits thereon, where works for the manufacture of brick had been constructed, and clay deposits worked and opened before the execution of the mortgage. *Russell v. Merchants' Bank*, (Minn.) 50 N. W. 228.

² *Moriarty v. Ashworth*, 43 Minn. 1; 44 N. W. 531

SUFFICIENCY OF ALLEGATIONS. — A complaint was held sufficient which alleged that complainant had sold certain land to B., taking a mortgage for the purchase-money; that the understanding between the parties was that the land was to be sold out in lots for building purposes; that instead of doing so B. was selling the soil of the land, and had opened quarries, and was disposing of the stone and sand thereon; that by reason of this waste the security of his mortgage was lessened. *Martin's Appeal*, (Pa.) 9 A. 490.

³ *Malone v. Marriott*, 64 Ala. 496. On appeal from an order from a judge

§ 267. **Against Vendee in Possession.** — A vendor who sells land, retaining the title as security for the purchase-money, sustains the same relation to the vendee, so far as the question of security is concerned, as does a mortgagee to a mortgagor, and, if the security of the land is insufficient, may restrain the vendee from cutting timber or committing other acts of waste on the land.¹ Such an injunction may be granted as an incident to a bill to enforce the vendor's lien, and the vendee's insolvency need not be alleged.² But a writ of injunction will not issue to restrain a grantee of land from taking possession and cutting timber, on the ground that the deed of conveyance was obtained by fraud on his part, where it is not alleged that he is insolvent.³

§ 268. **Against Grantor in Possession.** — On the other hand, a vendee may have his grantor in possession of the premises enjoined from committing waste thereon to the former's injury. Thus, where plaintiff, by written contract, purchased a tract of land of defendant, and paid a portion of the purchase-money down, and by the terms of the contract defendant was to remain in possession and have the use of the land during a period of five years, for the taxes, care, and improvements put thereon by him, in the mean time, plaintiff was held entitled to an injunction to restrain defendant from committing waste on said land, by quarrying and removing therefrom rock, or removing trees, except nursery stock.⁴

granting an injunction to restrain the commission of waste by a mortgagor after a final decree of foreclosure, the order was reversed on the ground that no complaint had ever been filed in any court, and that no summons had issued or publication of notice been made. *Jerolaman v. Foster*, 88 Ind. 232. In granting a mortgagee's prayer to enjoin future commission of waste, the court cannot oust an alienee of the mortgagor. *Coker v. Whitlock*, 54 Ala. 180.

¹ *Moses v. Johnson*, 88 Ala. 517 ; 7 So. 146 ; *Core v. Bell*, 20 W. Va. 169 ; *Van Wyck v. Alliger*, 6 Barb. (N. Y.) 507 ; *Scott v. Wharton*, 2 Hen. & M. (Va.) 25. See also *Lanier v. Allison*, 31 Fed. Rep. 100. The averment by the vendee that the value of the land would be enhanced by clearing it is affirmative matter, the burden of proving which is on him. *Moses v. Johnson*, 88 Ala. 517 ; 7 So. 146.

² *Core v. Bell*, 20 W. Va. 169.

³ *McQuarrie v. Hildebrand*, 23 Ind. 122. Where the plaintiff's affidavit merely alleges the defendant's insolvency on information and belief, and the defendant denies the allegation, supporting his denial by the affidavits of the sheriff and county surveyor, the injunction will not be continued to the hearing. *Ibid.* ; *McCormick v. Nixon*, 83 N. C. 113.

⁴ *Holmberg v. Johnson*, 45 Kan. 197 ; 25 P. 575.

§ 269. **Waste beyond Jurisdiction of Court enjoined.** — Since injunction operates *in personam*, it is not necessary that the premises upon which the waste is being, or is about to be, committed shall be within the territorial jurisdiction of the court, where it has acquired jurisdiction of the parties. A defendant, properly served, may be enjoined from committing waste upon, or otherwise impairing the value of property, in which the complainant is interested, even though the property is situated abroad.¹

§ 270. **Purchaser at Judicial Sale.** — Whether the title which a purchaser had acquired at a judicial sale, prior to the period allowed the execution creditor within which to redeem, is sufficient to entitle him to an injunction against waste by the execution creditor in possession, is not very clear upon the authorities. The reasoning of the cases sustaining his right is based upon the view that it is not necessary that a complainant seeking equitable relief should be vested with the legal title such as a mortgagee holds, but that an equitable title is sufficient; and therefore such purchaser is entitled to an injunction, pending the happening of the contingency upon which he will become possessed of the legal title together with the right of possession, to stay waste such as the cutting of timber, or other serious injury, tending to depreciate the value of the premises.² The contrary view is based upon a distinction which is taken between the rights of such a purchaser and those of a mortgagee, the latter being regarded as in many respects a purchaser, and the land mortgaged as having been specially appropriated to the payment of the debt, the security for which is lessened by acts of waste. It is further contended that the purchaser at a judicial sale, being merely a volunteer, is without privity of title with the owner, and should be left to his legal remedies.³ But both justice and analogous authority would seem to favor the right of such purchaser to the equitable protection of his security against acts of waste tending to impair it.⁴

¹ *Marshall v. Turnbull*, 32 F. 124.

² *Thompson v. Lyman*, 1 Del. Ch. 64; *Hughlett v. Harris*, 1 Del. Ch. 349.

³ *Law v. Wilgers*, 5 Biss. 1.

⁴ See *Vandemark v. Schoonmaker*, 16 N. Y. 16. In this case it was held that where a judgment is a lien upon one piece of land only, and from which alone satisfaction can be obtained (the judgment debtor being dead), and where such land is inadequate security for the payment of the judgment, a

§ 271. **Judgment Creditors.** — The protection by injunction against the impairment of the value of securities has been frequently extended to judgment creditors. Thus, where execution was levied upon land, and the sale was prevented by military orders, the plaintiff in the execution was granted an injunction to prevent waste of the premises.¹ So the severance of the engine and machinery of a mill upon incumbered real estate was considered a fraud upon the prior judgment creditors of the debtor, such as a court of equity has jurisdiction to restrain by injunction.² And pending a creditor's bill to subject the real estate of the deceased debtor, the court will restrain the heirs, by injunction, from cutting and carrying away any timber from the land, to prevent a loss to the creditors.³ But an injunction will not be granted at the suit of a creditor to stay his debtor's waste, unless it satisfactorily appears that irreparable injury will be done,⁴ or that there is danger of the debt being lost if an injunction is withheld.⁵ Nor can a creditor of a city maintain a bill to restrain waste of the city property belonging to the sinking fund, unless he shows some ground to apprehend that he is likely to lose his debt.⁶

§ 272. **Attaching Creditor.** — It cannot be said to be settled law that an attaching creditor before judgment has such an interest in the property attached as to entitle him to an injunction to restrain waste on the same. The granting of an injunction in such case might be proper under exceptional circumstances; but generally to grant it would be extending equitable interference further than is consistent with the lawful enjoyment and rights of property. In one case, however, the defendant being otherwise insolvent, and complainant having attached his real estate to secure an indebtedness upon a promissory note, it was held that complainant was entitled to an injunction to protect the

person in possession of such land will be restrained from the commission of waste thereon, by cutting and removing timber and wood, where such acts diminish the value of the premises, and thereby impair the only security the creditor has for payment of his debt.

¹ *Webb v. Boyle*, 63 N. C. 271.

² *Witmer's Appeal*, 45 Pa. St. 455. See also *Patton v. Moore*, 16 W. Va. 428.

³ *Tessier v. Wyse*, 3 Bland (Md.), 28.

⁴ *Pensacola, etc. R. R. Co. v. Spratt*, 12 Fla. 26.

⁵ *Casamajor v. Strobe*, 1 S. & S. 381.

⁶ *Roosevelt v. Draper*, 23 N. Y. 318.

attached estate, such relief being necessary to prevent the security being diminished or impaired.¹

V. TO PREVENT ILLEGAL TAKING AND INJURY UNDER CLAIM OF PUBLIC RIGHT.

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| <p>§ 273. General Principles.</p> <p>274. Relief against taking by Railroad Companies.</p> <p>275. Statutory Modifications of the Rule.</p> <p>276. Acts not within the Rule.</p> <p>277. No Injunction where Appropriation under Contract.</p> <p>278. Public Convenience considered.</p> <p>279. Diligence in applying for Relief.</p> <p>280. Same — Acquiescence in the Use of Street.</p> <p>281. Benefit of Estoppel confined to Original Company.</p> <p>282. Title in Dispute.</p> <p>283. Injunction refused where Money paid into Court.</p> <p>284. Remedy by Appeal as a Defence.</p> <p>285. Errors of Law and Irregularities not regarded.</p> | <p>§ 286. When Substantial Injury must be shown.</p> <p>287. Where Irreparable Injury must be shown.</p> <p>288. Same — Statutory Provisions.</p> <p>289. Former Award as a Defence.</p> <p>290. Remainderman entitled to Relief.</p> <p>291. Elevated Street Railway.</p> <p>292. Taking by Municipality.</p> <p>293. Same — Drainage ; Construction of Levee.</p> <p>294. When Injunction granted to Railroad Company.</p> <p>295. Taking for Highway.</p> <p>296. No Injunction against the Proceeding to condemn.</p> <p>297. Effect of Refusal to enjoin.</p> <p>298. Effect of Conditional Injunction.</p> |
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§ 273. General Principles. — To violate the constitutional provision that private property shall not be taken for public use until compensation has been ascertained and paid according to law, is considered a wrong of such nature as not to be capable of legal satisfaction and adjustment. Therefore the powers of courts of equity are freely exercised to protect property owners from violations and abuses of this salutary provision of the constitution.

¹ *Camp v. Bates*, 11 Conn. 51. In this case the court say: "The case in principle seems much like that of a mortgage. In both cases the land is appropriated as security for the debt. In both cases the creditor has the right to take the land, or resort to other property if it can be found. In both cases the debtor may remove the lien by payment of the debt; in both cases may deny or disprove the existence of the debt. Why, then, should not a court of chancery have the same power to prevent waste upon this property in the one case as well as in the other? If it is done in the one case, that the security given by the party should not be destroyed, it should be done in the other, that the security given by the law should not be destroyed. . . . Here, from the nature of the case, no actual possession of the property could be obtained by the creditor. But the writ of attachment gave to the creditor the statute privilege, and all the possession that the nature of the case admitted. The property is left in the possession of the debtor, just as in the case of a mortgage: but it is in view of the law, in the custody of the law itself, and being so, the law must protect those who are reposing upon its care."

The nature of the damage, whether irreparable or not, has nothing to do with the question thus presented. It is considered that there can be no adequate redress by action for the deprivation of a right guaranteed by the constitution.¹ Nor is the jurisdiction founded, as has been sometimes stated, upon any power of courts of equity to restrain abuses of corporate franchises by corporations, the remedy for such abuses being by action or proceeding instituted and prosecuted by the state.²

§ 274. **Relief against taking by Railroad Companies.** — The remedy is most frequently invoked under this head against railroad companies, on account of the necessity which they are under of frequently resorting to the power of eminent domain. It may be stated as a general rule, to which the only exceptions are those created by statute in one or two states, that an injunction will be granted to restrain the operation of a railroad across private lands until just compensation has been made as required by law.³ Even after a railroad company has entered upon the land and constructed its road and failed to pay the damages awarded against it, it may be enjoined from operating its line thereon until payment of the award, provided the owner has not been guilty of unreasonable delay in applying for the relief.⁴

§ 275. **Statutory Modifications of the Rule.** — The rule does not

¹ See *Western M. R. Co. v. Owings*, 15 Md. 199; *Semple v. Cleveland & P. R. Co.*, 33 A. 564; 172 Pa. St. 369; 37 W. N. C. 365; *Western Railway of Alabama v. Alabama G. T. R. Co.*, (Ala.) 11 So. 483. But see *Heilman v. Lebanon & A. St. Ry. Co.*, (Pa. Sup.) 37 A. 119; 180 Pa. St. 627; *Planet Property & Financial Co. v. St. Louis, O. H. & C. Ry. Co.*, (Mo. Sup.) 22 S. W. 616, holding that complainants had adequate legal remedy by action at law for damages.

² *Infra*, §§ 1765, 1804.

³ *Ray v. Atchison, etc. R. Co.*, 4 Neb. 440; *Western, etc. R. Co. v. Owings*, 15 Md. 199; *Smith v. Point Pleasant, etc. R. Co.*, 23 W. Va. 451; *Anderson v. Commissioners*, 12 Ohio St. 635; *Georgia, C. & N. Ry. Co. v. Archer*, 87 Ga. 237; 13 S. E. 636; *Zimmerman v. Kearney County* (Neb.), 50 N. W. 1126; *Menk v. O. & N. W. R. Co.*, 4 Neb. 21; *Spencer v. Point Pleasant, etc. R. Co.*, 23 W. Va. 401; *Campbell v. Point Pleasant, etc. R. Co.*, Id. 448.

⁴ *Cozens v. Bagnor Ry. Co.*, 1 Ch. App. 594; *Bohlman v. Green Bay, etc. R. Co.*, 30 Wis. 105; *Omaha, etc. R. Co. v. Menk*, 4 Neb. 21; *Evans v. Missouri, etc. R. Co.*, 64 Mo. 453; *Bohlman v. Green Bay, etc. R. Co.*, 40 Wis. 157; *Story v. New York Elevated R. Co.*, 11 Abb. (N. Y.) N. Cas. 236; *Kendall v. Missiquoi, etc. R. Co.*, 55 Vt. 438; *Gammage v. Georgia Southern R. Co.*, 65 Ga. 614; *Midland Ry. Co. v. Smith*, 109 Ind. 488; 15 N. E. 256; *Hibbs v. C. & S. R. Co.*, 39 Iowa, 340; *Murdock v. Prospect Park, etc. R. Co.*, 78 N. Y. 579; *White v. Nashville, etc. R. Co.*, 7 Heisk. (Tenn.) 518; *Williams v. New Orleans, etc. R. Co.*, 60 Miss. 689.

apply in cases where a railroad is authorized by statute to cross the track of another upon making just compensation therefor; and in such cases an injunction will not be granted.¹ Under the Illinois Eminent Domain Act, it is held that equity will not enjoin a railroad company from using a public street as a switch, under a permit from the city council, when the fee of the street is in the city, on the ground of injury to private property therein. The owner must seek a remedy at law.² And in another case that only upon failure of an execution at law will a court of equity enjoin an insolvent railway company from using a railroad track on a public street until an adjoining landowner's damages shall have been assessed, and paid.³ So in New Jersey the decisions seem to proceed upon the theory that the remedy provided by statute should be allowed to supersede all other remedies, legal and equitable. At any rate, it was held that an injunction will not be granted to restrain the use of land condemned for a street, the award of damages not having been paid, where a remedy at law exists, and that an action at law may be maintained for the amount of the award if no special mode of enforcing its payment is provided by statute;⁴ and in another and a more recent case, that the opening of a road will not be restrained because it will require the removal of complainant's house, which is shown to have been built by him with knowledge that it was within the line of the road as marked out and claimed by the authorities, but he will be left to a court of law for redress.⁵ Where, as in Arkansas, in proceedings to condemn land for a right of way, the question of the right to take cannot be raised, equity will enjoin in a proper case, where, for instance, fraud is shown, — but the case must be a clear one to authorize such interference.⁶ In an earlier New York case a decision was rendered in harmony with the view of the New Jersey court,⁷ but this decision has never been followed in any of the many cases subsequently presented and passed upon in New York.

¹ *Northern, etc. R. Co. v. St. Paul, etc. R. Co.* (Minn.), 1 Am. & Eng. R. R. Cas. 12; *Greenhalgh v. Manchester & B. R. Co.*, 3 Myl. & Cr. 784.

² *Mills v. Parlin*, 106 Ill. 60.

³ *Peoria, etc. R. R. Co. v. Schertz*, 84 Ill. 135, 140.

⁴ *Jersey City v. Gardner*, 33 N. J. Eq. 622.

⁵ *Verga v. Miller*, 45 N. J. Eq. 93; 15 A. 835.

⁶ *Neimeyer v. Little Rock Junction R. R. Co.*, 43 Ark. 111.

⁷ *Betts v. Williamsburgh*, 15 Barb. (N. Y.) 255.

§ 276. **Acts not within the Rule.** — A railroad company will not be enjoined from condemning real estate necessary for the purpose of becoming incorporated, on the ground that the statute under which the proceedings are had is unconstitutional, since that question can be determined by the court wherein the proceedings are had.¹ Nor does an injunction lie to restrain a railroad company from entering upon land for the purpose of surveying and locating its line, under a statute giving it such right.² But until the payment of the condemnation money or its deposit as required by law, a railway corporation obtains no right to the land attempted to be appropriated, excepting a right to make a survey.³

§ 277. **No Injunction where Appropriation under Contract.** — A written contract for occupancy, so long as the company is not in default, in performance of its terms is a waiver of the constitutional right to an injunction.⁴ Thus, where it appeared in an

¹ *Kip v. New York, etc. R. Co.*, 6 Hun (N. Y.), 24; *Aurora, etc. R. Co. v. Miller*, 56 Ind. 88. But see *Cal. Pac. R. Co. v. Cent. Pac. R. Co.*, 47 Cal. 549.

² *Bonaparte v. Camden, etc. R. Co.*, Bald. (N. Y.) 205; *Gottschalk v. Lincoln, etc. R. Co.*, 14 Neb. 389; *Lexington, etc. R. Co. v. Ormsby*, 7 Dana (Ky.), 276; *Morris Canal, etc. Co. v. Fagin*, 1 C. E. Gr. (N. J.) 419; *Vilas v. Milwaukee, etc. R. Co.*, 15 Wis. 233; *Pettibone v. La Crosse R.*, 14 Wis. 443; *Murdock v. Prospect Park, etc. R. Co.*, 73 N. Y. 579; *Troy, etc. R. Co. v. Boston, etc. R. Co.*, 7 Am. & Eng. R. R. Cas. 49; *Cumberland, etc. R. Co. v. Penna. R. Co.*, 57 Md. 267.

³ *Chicago, Keokuk, & Western Railroad Company v. Watkins*, 43 Kan. 50; 22 Pac. Rep. 985.

LAND UNDER RIVER. — Defendants were about to build a pier and abutments under water belonging to the complainants by grant from the state, without obtaining their consent, and without compensation or tender of damages, and without taking proceedings for condemnation. *Held*, that an injunction should issue, enjoining defendants; and that complainants were not deprived of the right thereto, because they held the lands subject to the right of public navigation. *Morris Canal, etc. Co. v. Mayor, etc.*, 26 N. J. Eq. 294.

⁴ *Baltimore, etc. Co. v. Highland*, 48 Ind. 381. See also, *Tapert v. Detroit, etc. R. Co.*, (Mich.) 11 Am. & Eng. R. R. Cas. 413. The provision of Wis. Laws, 1861, ch. 175, which requires that no injunction shall be granted to prevent the occupancy of lands by a railway company, in certain cases, — applies only to cases where land has been actually occupied by the company with tracks or depots, and with either the express or implied consent of the owner. It does not apply to a case where the company merely entered by force, against the owner's protest, and commenced preparing the land as a road pit. *Bohlman v. Green Bay, etc. R. R. Co.*, 30 Wis. 105.

TAKING CEMETERY. — A railroad company received permission to run its road through a cemetery. Under the plan proposed but little injury would

action to enjoin a railroad corporation from running its cars over a portion of a highway in front of plaintiff's land, the fee of which, subject to the public use, was in plaintiff, who had never received compensation for the use thereof, that the company was induced to construct its road upon such highway by the express consent and license of the plaintiff, it was held the injunction should be refused.¹ But where a party has conveyed a right of way, an injunction lies to prevent the illegal appropriation of a route in a different place,² unless such subsequent location is consented to by the landowner.³ And where, from the terms of the grant, and the circumstances under which it was made, it is apparent that both parties understood the right granted was to be exercised at the time of the final location and construction of the road and not afterwards, an injunction will be granted restraining the company from locating on any additional parcel of land belonging to the same owner after the road has been located and completed without condemnation proceedings and compensation.⁴

§ 278. **Public Convenience considered.** — Private corporations performing public duties such as that of common carriers will not, for slight cause, be obstructed in their operations, thus causing inconvenience and damage to the public;⁵ and where granting an injunction would stop the operation of a railroad and

be done to the cemetery. After labor had been fairly begun, three, out of many lot-owners, sought to enjoin the action of the company. *Held*, that the refusal of the chancellor to grant the writ would not be interfered with. *Wood v. Macon & Brunswick R. T. Co.*, 68 Ga. 539.

¹ *Murdock v. Prospect Park, etc. R. R. Co.*, 17 N. Y. Supreme Ct. 598.

CONSENT OF LESSEE. — Where a railroad company has entered on land with the consent of the owner of the fee, and has proceeded to condemn the same, the abandonment by the lessee of the premises, who is not a party to such proceedings for condemnation, of his intention to enjoin the appropriation of the premises by the railroad, where he at the same time informed the attorney for the railroad of his intention to bring an action for damages for the trespass, does not amount to a consent that the company might enter before ascertaining the value of the land and appropriate the same before paying for it. *Capers v. Augusta, G. & S. R. Co.*, 76 Ga. 90.

² *Bentley v. Wabash, etc. R. Co.*, 61 Iowa, 229; *Hall v. Pickering*, 40 Me. 548.

³ *Hosher v. Kansas City, etc. R. Co.*, 60 Mo. 329. See also, *Munkers v. Kansas City, etc. R. Co.*, 60 Mo. 334.

⁴ *Warner v. Sandusky, etc. R. Co.*, 39 Ohio St. 70.

⁵ *Torrey v. Camden, etc. R. Co.*, 3 C. E. Green Ch. (N. J.) 293; *Cook v. North, etc. R. Co.*, 46 Ga. 618.

thus cause serious public inconvenience and annoyance, the court will frequently exercise its discretion to withhold an injunction for a time in order to afford an opportunity for the assessment and payment of damages.¹

§ 279. **Diligence in applying for Relief.** — The application for relief against an illegal or irregular appropriation of property to public use, must come within due season, the right to relief being lost by laches in seeking the protection of the court.² It is said: "One cannot stand by and suffer another to expend large sums of money on his land as a part of a great system of improvement, and then stop by injunction the entire system until he is paid."³ Accordingly where, with full knowledge of the occupation of his premises, and the progress of the improvement, the owner of the land lay by for a considerable period without attempting to prevent the taking possession and occupation by the company, a court of equity refused to enjoin the latter from running its cars over the road. In such case the conduct of the owner amounts to an acquiescence in the construction of the road over his land, and the public thereby acquire rights which will not be interfered with by a court of equity by injunction.⁴ So the owner of a water power, who had allowed without objection a city, without first assessing and paying his damages, to erect works for a water supply by drawing water from the stream and thus diminishing his power, was held estopped in equity from seeking protection by injunction, and was relegated to his remedy

¹ *Story v. New York Elevated R. Co.*, 11 Abb. N. Cas. (N. Y.) 236; *Gamage v. Georgia Southern R. Co.*, 65 Ga. 614.

² *Western Union Tel. Co. v. Judkins*, 75 Ala. 428; *Florida Southern R. Co. v. Hill*, 23 So. 566. But an abutting owner was held not guilty of laches because he does not proceed to enjoin the unauthorized construction of a street railroad until two weeks after the work of construction began, without having knowledge, before that time, that the work was about to commence. *Beekman v. Third Ave. R. Co.*, (Sup.) 43 N. Y. S. 174; 13 App. Div. 279.

³ *Griffin v. Augusta, etc. R. Co.*, 70 Ga. 164.

⁴ *Pensacola, etc. R. Co. v. Jackson*, 21 Fla. 146; *Easton v. N. Y. etc. R. Co.*, 24 N. J. Eq. 49; *Pickert v. Ridgefield Park R. Co.*, 25 N. J. Eq. 316, 323; *Atty.-Gen. v. Del., etc. R. Co.*, 27 N. J. Eq. 631; *Meredith v. Sayre*, 32 N. J. Eq. 557; *Carson v. Coleman*, 3 Stock. (N. J.) 106; *Griffin v. Augusta, etc. R. Co.*, 70 Ga. 164; *Sheldon v. Rockwell*, 9 Wis. 180; *Pettibone v. LaCrosse, etc. R. Co.*, 14 Wis. 443; *Hentz v. L. I. R. Co.*, 13 Barb. (N. Y.) 646, 655; *Goodin v. Cin. & W. Canal Co.*, 18 Ohio St. 169; *Bassett v. Salisbury Manuf. Co.*, 47 N. H. 426. Acquiescence for fourteen years during which time all ordinary means for obtaining indemnity had failed was held to be sufficient ground for refusing an injunction. *Hentz v. Long Island R. Co.*, 13 Barb. (N. Y.) 646.

for damages.¹ And the case is not altered because the complainant at the time when a lot was taken for purposes of a railroad, supposed the company was entitled to enter and take the land under the statute.²

§ 280. **Same — Acquiescence in the Use of Street.** — Equity will not entertain a bill of an abutting proprietor to enjoin a railroad company from running trains over a track in a public street under legislative authority, on the ground that he has not been compensated for incidental damages, where his property has not been actually taken, and he has made no effort to arrest the work, or given notice that he claims damages, until after the track has been laid, though the constitution of the state³ requires compensation in advance for the taking or damaging property for public use.⁴ Accordingly where a telegraph company having erected poles without just compensation, the purchaser of the land allowed two years to elapse after he acquired the title before suing for injunction, it was held that his laches prevented recovery.⁵ On the same principle where an elevated railroad company has obtained consent of the city and property owners, and constructed its road in the street beyond plaintiff's property, equity, in its discretion, will refuse to enjoin the further prosecution of the work on the ground that plaintiffs have not been paid for consequential damages.⁶

§ 281. **Benefit of Estoppel confined to Original Company.** — But the fact that a landowner has made no objection to the occupation of his land by a railroad company, does not inure to the benefit of a company which succeeds it, whether by an out-

¹ *Logansport v. Uhl*, 99 Ind. 531.

ESTOPPEL OF TURNPIKE COMPANY. — A turnpike company, a part of whose road-bed has been condemned for railroad purposes on condition that the railroad company should build a certain described fence between its track and the turnpike, cannot, after allowing the railroad to be built, and operated for six years, without requiring the railroad company to build the fence, and after the railroad has passed into the hands of receivers, obtain an injunction restraining the operation of the road over the condemned land, because of non-compliance with the condition. *Spencer v. Falls Turnpike Road Co.*, 70 Md. 136; 16 A. 451.

² *Greenhalgh v. Manchester, etc. R. Co.*, 3 Myl. & Cr. 784.

³ Const. Mo. art. 2, 21.

⁴ *D. M. Osborne & Co. v. Missouri Pac. Ry. Co.*, 35 F. 84. See also, *Wirth v. Postal Tel. Cable Co.*, 7 Ohio Cir. Ct. R. 290.

⁵ *Western Union Telegraph Co. v. Judkins*, 75 Ala. 428.

⁶ *Nutting v. King's County E. R. Co.*, 48 Hun, 348; 1 N. Y. S. 383.

right purchase or a purchase at a sale on foreclosure of a mortgage on the road and road-bed. The landowner will be entitled to an injunction against the successor company, restraining the further operation of the road over his land until a judgment for damages obtained against the original company has been paid; and in such a case it was held unimportant that the judgment against the old company was obtained two years before the foreclosure sale, and that the road had been operated over the land during that time, and that no further steps were taken by suit to enforce payment of the damages until the new company had been occupying the land for thirteen years. These do not constitute a waiver of the owner's right to compensation.¹

§ 282. **Title in Dispute.** — Where complainant alleges that his land has been seized under a claim of right of eminent domain, and without due compensation, but defendant's answer denies complainant's title and right to possession, equity will not take jurisdiction by injunction until the title thus involved in dispute has been determined at law to be in the complainant.² So where it appeared that the public authorities were about to extend a public street under a claim of title over a wharf erected on lands possessed and claimed by plaintiff, an injunction was refused.³ But where the title of one claiming under the land laws of the United States is under consideration in the land-office, a railroad company will be enjoined from entering upon the land until it has taken proceedings to condemn the land, and has given security for the payment of the appraised damages as soon as

¹ *Gilman v. Sheboygan, etc. R. R. Co.*, 40 Wis. 653. See also, *Kendall v. Missiquoi & Clyde River R. R. Co.*, 55 Vt. 438. In the last case it appeared that a railroad company laid its road across A.'s land without complying with the requirements of the statute regulating the taking of land for railroad purposes, and without A.'s consent. The company promised to pay her, but failed to do so. Before taking A.'s land the company mortgaged its property and franchises to secure the bonds. After some years the mortgage was foreclosed. It was held that A. could maintain a suit for injunction against the further use of her land, unless her land damages were paid; her remedy by ejectment not being plain, and there being no facts in the case which should create an estoppel against her.

² *East & West R. R. Co. v. East Tennessee, Virginia, etc. R. R. Co.*, 75 Ala. 275. See also as to disputed titles in actions to enjoin condemnation proceedings, *Murphy v. Southern Ry. Co.*, (Ga.) 24 S. E. 867; *Ocean City R. Co. v. Bray*, (N. J. Ch.) 35 A. 839; *Thouron v. Schuylkill Electric Ry. Co.*, 34 A. 601; 174 Pa. St. 366.

³ *Balantine v. Harrison*, 37 N. J. Eq. 560.

complainant's title shall have been determined in the land-office.¹ And in an action by one in possession under color of title the burden is on the opposite party disputing it, to show title in himself.²

§ 283. **Injunction refused where Money paid into Court.** — Where proceedings for the condemnation of land have been regularly instituted and prosecuted to judgment, or award, and the amount ascertained has been tendered or paid into court, upon refusal to accept it or pending appeal, equity will not interpose, since the money stands in lieu of and as ample compensation for the land taken until the award or judgment is reversed on appeal or writ of error. Nor is it sufficient ground for equitable interference in such case that the company appropriating the land is insolvent, and will not be able to pay a judgment for increased damages, which may be obtained on appeal, as plaintiffs have a lien therefor on the land, enhanced in value by the construction of the road, and an adequate remedy by a restraining order out of chancery to compel payment as a condition of further enjoyment of the easement.³ Nor is the fact that the company already has one right of way over the lands of plaintiffs important, the power to condemn being co-extensive with the requirement for the successful operation of the road;⁴ nor does the fact that the law court has refused to restrain the construction of the road until the rights of the parties could be determined, give equity jurisdiction to interfere.⁵

§ 284. **Remedy by Appeal as a Defence.** — After condemnation proceedings have been instituted and prosecuted in compliance with law, and the landowner, if dissatisfied with the award, has neglected to appeal, equity will refuse to interfere upon well known principles. And after a claim for damages in laying out a road has been made and allowed, and no appeal has been taken, equity will not enjoin the opening of the road on the ground that the damages were inadequate.⁶ So under a statute relating to

¹ *Jones v. Florida, C. & P. R. Co.*, 41 F. 70.

² *Oglesby v. City of Santa Barbara*, 51 P. 181; 119 Cal. 114. See also *Heinzman v. Winona, & St. P. Ry. Co.*, 77 N. W. 956.

³ *Cooper v. Anniston & A. R. Co.*, 85 Ala. 106; 4 So. 689.

⁴ *Ibid.*

⁵ *Trimmer v. Pennsylvania, P. & B. R. Co.*, (N. J.) 17 A. 967.

⁶ *Hopkins v. Keller*, 16 Neb. 569; *Detroit, G. H. & M. Ry. Co. v. City of Detroit*, (Mich.) 52 N. W. 52.

erty, to form part of an electric motor system, it not appearing that the injury to plaintiff, if any, caused by allowing defendant to proceed until the trial, would be irreparable, as a public improvement.¹

§ 288. **Same — Statutory Provisions.** — In West Virginia and Oregon statutory provisions govern the extent of injury which will warrant an injunction in favor of abutting owners against the construction of public improvements in streets and highways. Under the West Virginia statute authorizing a railroad company, with the assent of the municipal authorities, to construct and operate its road along the public streets of a city, the abutting lot owner is not entitled to an injunction against the company, unless his injury therefrom will be such as to entirely destroy the value of his property, and so be equivalent to an actual taking of it by the company.² In Oregon a railway company authorized to construct and operate its road upon a street in an incorporated city, by authority of the common council thereof, granted in accordance with the charter of the city, or upon a county road, under an agreement with the county court of the county in which the road is situated, in accordance with the statute, cannot be enjoined from proceeding therewith at the suit of an owner of lands abutting upon the street and county road, whether the fee to the lands to the centre of the street and county road adjacent thereto is in such owner or not, without establishing by allegations and proofs, that the construction and use of the railway will specially interfere with the owner's ingress and egress.³

§ 289. **Former Award as a Defence.** — In an action brought by a landowner to obtain the confirmation of an award made in condemnation proceedings, and payment of the amount, or payment to plaintiff of costs and expenses incurred in the proceedings, a preliminary injunction against any further proceedings under the order and award should not ordinarily be granted.⁴ And

¹ *Tracy v. Troy & L. R. Co.*, 7 N. Y. S. 892; 54 Hun, 550.

² Code W. Va. ch. 54, § 50; *Ohio River R. Co. v. Gibbens*, 35 W. Va. 57; 12 S. E. 1093; *Arbenz v. Wheeling & Henrietta R. Co.*, 33 W. Va. 1; 10 S. E. 14.

³ An. Laws Or. 3242; *Paquet v. Mt. Tabor St. R. Co.*, 18 Or. 233; 22 P. 906.

⁴ *Watson v. New York, West Shore, etc. Ry. Co.*, 64 How. (N. Y.) Pr. 220. Complainant's affidavit alleging such former award, but not stating whether

an injunction restraining defendant from using or appropriating plaintiff's easement with its elevated railway will be permanently suspended where it appears that since the rendition of the judgment granting the injunction, plaintiff has been awarded compensation for his easement in condemnation proceedings instituted by defendant, and the amount has been paid into court.¹ So where complainant's land had been condemned by a railroad company, and the money paid into court, it was decided to be no ground for equitable interference with the construction of the railroad that a former company holding the same franchise condemned the land to the extent of two-thirds, and that complainant refused to accept the award, as an estoppel by judgment can be set up at law.²

If the facts show that the company had no power to condemn the lands of the complainant, or that the lands are not necessary and proper for the purposes named in the petition for condemnation, they can be urged on the hearing for the appointment of commissioners, and there is no necessity for an injunction so far as they are concerned.³

or not it was in writing, or whether it was of record, or had been lost, is not sufficient proof that the award was made; but the record must be produced or established. *Trimmer v. Pennsylvania P. & B. R. Co.*, (N. J.) 17 A. 967.

¹ *Watson v. Metropolitan, etc. Co.*, 8 N. Y. S. 533; 57 N. Y. Sup. 364.

AWARD OF DAMAGES; CANAL ACROSS RAILROAD PROPERTY, ETC. — On a petition by a railroad for an injunction to restrain a person from building a canal across land previously condemned for the railroad's use, for which damages have been assessed by a jury, where a projected highway of the city coincides with the intersection of the proposed canal and railroad in a marsh inaccessible to horses and vehicles, and defendant has procured the adoption of a resolution by the city council granting to defendant a contract for the erection of a drawbridge at that point, a preliminary injunction prayed by defendant against the construction of the railroad by a solid filling will not be granted unless he will stipulate to release the judgment for damages already awarded, and submit to a new award, and obtain the consent of the city council to allow the railroad to cross the street in question at grade, and not insist upon a drawbridge. *Dixon and Knapp, Justices*, and *Brown, Clement, Smith, and Whitaker, JJ.*, dissenting. *Packard v. Bergen Neck Ry. Co.*, (N. J.) 22 A. 227.

² *Trimmer v. Pennsylvania P. & B. R. Co.*, (N. J.) 17 A. 967.

³ *Cal. Pac. R. R. Co. v. Central Pac. R. R. Co.*, 47 Cal. 549. Complainant claimed all the land as his own, and treated it as such. He alleged that the company which procured the former award to be made entered on the land, and constructed a pier for a bridge. He was awarded by the commissioners last appointed the value of the stones in the pier. It was held that, if the

§ 290. **Remainderman entitled to Relief.** — The right to compensation and consequently to relief against an illegal taking is not confined to the tenant actually in possession; but those entitled to the reversion have such an interest as will entitle them to protection. Accordingly, where a railway company, having obtained from the tenant for life a quitclaim deed of land over which it proposes to construct and operate a line of road, is about to enter upon the land for that purpose, against the objection of the owner of the remainder in fee, and without making compensation to him, such proposed action may be enjoined at the suit of such owner.¹

§ 291. **Elevated Street Railway.** — The use for an elevated street railroad of the easement in the street of an abutting owner, whose rights have not been acquired by purchase or condemnation, is unlawful, and the abutting owner has the right to equitable relief against the mere operation of the road resulting in any injury to such owner.² Such action cannot be maintained on the ground of preventing a multiplicity of suits for repetition

alleged former award was made, complainant regarded and treated it as abandoned. *Trimmer v. Pennsylvania P. & B. R. Co.*, (N. J.) 17 A. 967.

¹ *Gorrill v. Railroad Co.*, 4 Ohio Cir. Ct. 398.

² *American Bank-Note Co. v. New York El. R. Co.*, 13 N. Y. S. 626; *Jewett v. Union E. R. Co.*, 1 N. Y. S. 123. Plaintiff must show that the company has not made due compensation for the easement appropriated. *Watson v. Metropolitan El. Ry. Co.*, 8 N. Y. S. 533; 57 N. Y. Super. Ct. 364.

ELEVATED STREET RAILWAY STATION. — Where an elevated railroad company, without right, erects a station opposite a building, parallel to it, equal to it in height, and so close to it as to darken its interior to such an extent as to prevent the owner from carrying on his business in it as beneficially and profitably as before, such owner may maintain an action to perpetually enjoin the company from erecting and maintaining such station, and to compel its removal. *Mattlage v. New York El. R. Co.*, 14 Daly, 1. Where, under Act Ga. 1888, p. 13, a street railway company was to pay all damages arising from the construction of the road as a condition precedent, a property owner may enjoin the construction on nonpayment of damages due him, though the act provides that either party may have the damages assessed. *Georgia F. & S. R. Co. v. Ray*, (Ga.) 11 S. E. 352.

ADDITIONAL SERVITUDE; SECOND TRACK. — Under Const. N. Y. art. 1, § 6, which provides that no one shall be deprived of life, liberty, or property without due process of law, and that private property shall not be taken for public use without just compensation, an elevated railroad company will be enjoined from constructing an additional track in front of plaintiff's premises, unless it has acquired the right to impose such additional burden on plaintiff's property by condemnation proceedings, as provided by Laws N. Y. 1875. ch. 606. *Stroub v. Manhattan Ry. Co.*, 15 N. Y. S. 135, affirming 14 N. Y. S. 773.

of the trespass, where such ground of jurisdiction is not alleged in the complaint nor found by the court; nor unless there is an actionable injury entitling to substantial relief.¹ The right of an abutting owner to relief in such case is not affected, however, by the fact that his premises are subject to an outstanding lease.²

§ 292. **Taking by Municipality.** — An incorporated town or city which, without having taken proceedings to condemn the land according to law, is proceeding to open a street through lands which are private property and have not been dedicated for highway purposes, may be restrained by injunction.³ And where a municipal corporation, in the petition, resolution, and notice, specifically describes certain property which it purposes to appropriate to its uses, injunction will lie to restrain it from taking any other property.⁴ On the same principle a railroad company may be enjoined from taking land under an ordinance which is void.⁵

§ 293. **Same — Drainage — Construction of Levee.** — Where a city by means of a basin and culvert discharges all the surface water carried to a particular point in such a manner that the water, by its own force, makes a channel for itself through the land of plaintiff, a taking of private property for public use occurs; and, if no compensation to the owner is provided, such use of his property by the city will be enjoined.⁶ So the owner

¹ *Purdy v. Manhattan El. Ry. Co.*, 13 N. Y. S. 295.

² *Suarez v. Manhattan Ry. Co.*, 15 N. Y. S. 224; *Macy v. Railway Co.*, 12 N. Y. S. 804, following.

³ *Pierpoint v. Harrisville*, 9 W. Va. 215; *Mason City Salt, etc. Co. v. Mason*, 23 W. Va. 211; *New Albany v. White*, 100 Ind. 206; *City of Fort Wayne v. Lake Shore & M. S. Ry. Co.*, 32 N. E. 215; 132 Ind. 558. Complainant is not limited to an action of trespass, but is entitled to have the illegal acts perpetually enjoined. *Vanderlip v. City of Grand Rapids*, 73 Mich. 522; 41 N. W. 677.

⁴ *Bass v. City of Fort Wayne*, 121 Ind. 339; 23 N. E. 259.

TAKING UNDER REPEALED STATUTE. — Where condemnation proceedings were commenced under the California statute entitled "An act to provide for opening streets in the town of Alameda," approved March 23, 1876, an injunction order restraining such proceedings, made four months after the passage of another act repealing the first act mentioned, would be erroneous, as the threatened wrong against the plaintiff would have been averted by the intervention of the legislature, and the condemnatory proceedings would fall of their own weight. *Cohen v. Grey*, 70 Cal. 85; 11 P. 508.

⁵ *Hickey v. Chicago & Western Ind. R. R. Co.*, 6 Ill. App. 172.

⁶ *Miller v. City of Morristown*, 47 N. J. Eq. 62; 20 A. 61.

of land is entitled to an injunction against persons undertaking to construct a levee thereon, until the amount of his damages has been ascertained and paid according to law.¹

§ 294. **When Injunction granted to Railroad Company.** — Where a railroad company asks an injunction against another to restrain it from crossing complainant company's track under statutory authority, the extraordinary relief will not be granted, although no compensation has been ascertained or paid, unless irreparable injury is shown.² But a temporary restraining order, pending final hearing, was granted in one such case.³ The same rule of non-interference applies where the complaint is that another company is constructing its road upon a route belonging to complainant company.⁴

§ 295. **Taking for Highway.** — An injunction will be granted to prevent the laying out and establishing a road through a farm and improvements, without prior compliance with the requirements of the law in such cases.⁵ But it has been held that a citizen cannot enjoin the opening of a public road over his inclosed lands, when it appears from his bill, that he has not taken

¹ *Horton v. Hoyt*, 11 Iowa, 496.

² *Northern, etc. R. Co. v. St. Paul, etc. R. Co.*, (Minn.) 1 Am. & Eng. R. Cas. 12; *Greenhalgh v. Manchester & B. R. Co.*, 3 Myl. & Cr. 784; *Pennsylvania R. Co. v. Suburban Rapid Transit Co.*, (Pa. Com. Pl.) 11 Pa. Co. Ct. R. 591; *Rosenberger v. Miller*, 1 Mo. App. Rep'r, 640; 61 Mo. App. 422.

³ *Raleigh & W. Ry. Co. v. Glendon & G. Min. & Manuf'g Co.*, (N. C.) 17 S. E. 77.

⁴ *New York & Albany R. R. Co. v. New York, West Shore, etc. Ry. Co.*, 11 Abb. (N. Y.) N. Cas. 386. On a petition by a railroad for an injunction to restrain a person from building a canal across land previously condemned for the railroad's use, for which damages have been assessed by a jury and paid into court, defendant cannot urge that the complainant's charter has expired, since such objection should have been taken by *certiorari*. *Packard v. Bergen Neck Ry. Co.*, (N. J.) 22 A. 227.

⁵ *Floyd v. Turner*, 23 Tex. 292; *Curran v. Shattuck*, 24 Cal. 427. Injunction lies to restrain a police jury in Louisiana from taking lands of plaintiff for a highway, without a preliminary assessment of damages, as prescribed by law. *Knox v. Policy Jury of Baton Rouge*, 27 La. An. 204.

In *Massachusetts*, under Pub. St. cc. 49, 98, requiring that "permanent stone bounds be erected at the termini and angles of the road laid out," the placing of stone bounds in accordance with an order for widening a street is not, as a matter of law, a taking of possession, within § 88, making the laying out or alteration of a way void as against the owner, unless possession is taken for the purpose of constructing such way within two years. *Parker v. Norfolk County*, 150 Mass. 489; 23 N. E. 281.

the steps pointed out by law to procure the assessment of his damages.¹

§ 296. **No Injunction against the Proceeding to condemn.** — An injunction will not lie to restrain the opening of a proposed highway, by condemnation proceedings, when the same are not void, or so defective as not to afford information as to the effect the proposed highway would have upon those interested;² nor, upon the ground that the reviewers appointed by the inferior court signed the petition for the road, and took an active interest in getting it up;³ nor upon the ground that it does not appear, from the return of the reviewers, that they were sworn according to the requirements of the statute.⁴

§ 297. **Effect of Refusal to Enjoin.** — The fact that a court refuses to enjoin a railroad company from taking possession of land before condemnation and payment of compensation, does not legalize the possession so taken, nor relieve the company from an action at law for the wrongful entry.⁵

§ 298. **Effect of Conditional Injunction.** — Where a judgment awarded an injunction against the maintenance of defendant's railroad in the highway in front of plaintiff's property, with a condition that it should be inoperative on payment of a certain sum, defendant was held not equitably entitled to a suspension of the injunction upon the acquisition by it of the property by condemnation, as a matter of right; nor, under the circumstances, having been for ten years an intruder on the property without attempting legally to acquire it.⁶

¹ *Parkham v. Decatur County*, 9 Ga. 341.

² *McDonald v. Payne*, 114 Ind. 359; 16 N. E. 795; *Conner v. Covington Transfer Ry. Co.*, (Ky.) 19 S. W. 597; see also *Lauterman v. Blairstown Ry. Co.*, 28 N. J. Eq. 1; *Coe v. New Jersey, etc. Ry. Co.*, *Ib.* 27.

³ *Parkham v. Decatur County*, 9 Ga. 341.

⁴ *Ibid.*

⁵ *Grand Rapids L. & D. R. Co. v. Chesebro*, 74 Mich. 466; 42 N. W. 66.

⁶ *Lawrence v. Metropolitan El. Ry. Co.*, 12 N. Y. S. 546.

DAMAGES SUBSEQUENT TO FILING COMPLAINT. — In an action to enjoin the construction of an elevated railroad in front of plaintiff's premises, no damages can be recovered for the construction of the road after the action for the injunction was commenced, unless a supplemental complaint is served alleging such construction. *Third Ave. R. Co. v. New York El. R. Co.*, 19 Ab. N. C. 261.

CHAPTER V.

PROTECTION OF RIPARIAN AND WATER RIGHTS.

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| <p>§ 299. Subject of increasing Importance.
 300. Nature and Extent of Riparian Rights.
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§ 299. **Subject of increasing Importance.** — Owing to the new uses to which water has been devoted in this country in recent years, especially in several Western and Pacific states and territories, and the peculiar adaptability of the equitable remedy by injunction to protect and secure these as well as other rights long established and still recognized, the subject is deemed of sufficient importance for treatment in a separate chapter.

§ 300. **Nature and Extent of Riparian Rights.** — Such rights have sometimes been stated to be in the nature of easements or corporeal hereditaments, which follow or are embraced in the ownership of the soil over which the water naturally passes.¹

¹ Hill v. Newman, 5 Cal. 445; Sackett v. Wheaton, 17 Pick. 105; Angell on Watercourses, p. 8.

But the nature of the right and its proper definition are for the present purpose matters of little importance. Still, it may be well to suggest that water wholly on one's land is an inseparable part of the realty, and is owned and held by the owner of the soil as such, and the same is true of surface waters; but with respect to streams that have well-defined channels and flow perennially or for considerable seasons, the owner of the soil has only an easement in their waters, or a right to their reasonable use or enjoyment, not to be exercised to the prejudice or total deprivation of other riparian proprietors. What is such reasonable use is a question of fact depending upon the circumstances appearing in each particular case.¹

§ 301. **Rights protected by Injunction.** — The infringement of rights in water may constitute a trespass or a nuisance; but in order to entitle the owner of the right to an injunction it is not necessary that it amount to either, if the deprivation or infringement be calculated to or actually does inflict injury not susceptible of accurate pecuniary ascertainment, or will probably result in a multiplicity of suits. Nor is it necessary to wait until damage has actually resulted.² In such cases the insolvency

¹ *Heilbron v. The '76 Land and Water Co.*, 80 Cal. 189; *Lux v. Haggin*, 69 Cal. 394, 400; *Swift v. Goodrich*, 70 Cal. 103; *Stanford v. Felt*, 71 Cal. 249. In *Alta Land, etc. Co. v. Hancock*, 85 Cal. 219, a general rule, apparently reasonable and just, was stated by Fox, J., though the question of what constitutes a reasonable use was not at issue. It is in substance as follows: The right to a reasonable use of the water of a stream by a riparian proprietor, in common with others in like situation, for the purposes of irrigation, is recognized only as being in subordination to the rights of all other riparian proprietors to the use of water for the supply of the natural wants of man and beast, extended to the occupants of each and every tract bordering upon the stream, held as an entirety, whatever its extent; and the right of irrigation cannot be extended even by implication so as to exclude the rights of other riparian proprietors. These decisions rest upon principles long settled. In *Ellwell v. Crowther*, 31 Beav. 163, the plaintiff was entitled, for the purposes of his mill, to a supply of water by means of a stream running through and over the lands of the defendant, and the defendant, in working the minerals lying under the bed of the stream, had caused a subsidence both of the bed of the river and of the adjoining land to the extent of four feet, for some distance, and, in order to maintain the original level of the stream, the defendant had constructed embankments on either side; but there was no actual diminution in the supply of water to the mill. Upon a bill for an injunction, the court refused to make a hostile decree against the defendant, but, by reason of the subsidence which had taken place in the bed of the stream, he was required to give an undertaking not to work the minerals in such a way as to obstruct or interfere with the flow and passage of the water to the mill.

² *Lake Erie & W. R. Co. v. Young*, (Ind. Sup.) 35 N. E. 177.

of the defendant, though not decisive, will be given important consideration, especially where there is any doubt as to the nature and extent of the injury.¹

§ 302. **Common-law Riparian Rights.** — The common-law rights in and to the waters of flowing streams which will in proper cases be protected by injunction against infringement, rest upon clear and settled principles, which may be thus summarized: The proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream, and, consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor without the consent of the other proprietors who may be affected by his operations; no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back on the proprietors above. Every proprietor who claims a right either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, prove an actual or establish a presumptive grant or license from the proprietors affected by his operations.² The rights of a land-owner through whose lands a stream of water flows, to the use and enjoyment thereof, and to have the same flow in its natural

¹ *Graham v. Dahlonega Gold Mining Company*, 71 Ga. 296. In this case it appeared that there had been a continued or permanent diversion of waters of a stream running through plaintiff's land by means of a ditch opened by the defendants, thus depriving plaintiff of the use of the stream for agricultural and mining purposes, there being valuable gold mines on the premises which he was unable to work or otherwise utilize for want of the water thus diverted, and that defendants were insolvent, or rapidly becoming so, and it was held a proper case for equitable interference and relief by injunction.

² See *Wright v. Howard*, 1 S. & S. 203. "The right to the flow of the water is inseparably annexed to the soil, and passes with it, not as an easement or appurtenant, but as a parcel. Use does not create, and disuse cannot destroy and suspend it. Each person through whose land a watercourse flows has (in common with those in like situation) an equal right to the benefit of it as it passes through his land, for all useful purposes to which it may be applied; and no proprietor of land on the same watercourse has a right unreasonably to divert it from flowing into his premises, or to obstruct it in passing from them, or to corrupt or destroy it." *Johnson v. Jordan*, 2 Met (Mass.) 239, per Ch. J. Shaw. "The right to the use of water flowing over land is undoubtedly identified with the realty, and is a real and corporeal hereditament." *Cary v. Daniels*, 5 Met. 238; see also *Wilson v. Bondurant*, (Ill. Sup.) 32 N. E. 498.

and accustomed course, without corruption or pollution, will be protected in equity by injunction.¹

§ 303. **Statutory Changes — Appropriation for Irrigation, etc.** — This common-law rule has to some extent been modified or rather affected by statutes in several Western and Pacific states, which provide for the diversion and appropriation of the waters of streams to public uses, and designating irrigation in farming neighborhoods as a public use; but it would be impossible if not foreign to our purpose to state upon judicial authority the full effect of such legislation. In the leading case in California² it was decided, after an elaborate and learned discussion of the authorities, that none but riparian owners could take out the waters of perennial streams for purposes of irrigation, and that an attempt by others to do so would be enjoined at the suit of a riparian proprietor. In a later case, where³ virtually all the water of such a stream had been already appropriated by one riparian owner, it was held that a decree perpetually enjoining a riparian proprietor above him from diverting a portion of the water to the great prejudice of the first appropriator, was erroneous, and that it was immaterial whether the last appropriator had used or intended to use any of the water for irrigation pur-

¹ *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587; 6 So. 78; *Corning v. Troy Iron, etc. Factory*, 40 N. Y. 191. See also, *Holt v. Rochdale*, L. R. 10 Eq. 354; *Goldsmid v. Tunbridge, etc. Commrs.*, L. R. 1 Ch. 349; *Atty.-Gen. v. Birmingham*, 4 Kay & J. 528; *Appeal of Haupt*, 125 Pa. St. 211; 17 A. 436; 23 W. N. C. 545; *Atty.-Gen. v. Leeds Corporation*, L. R. 5 Ch. 583; *Atty.-Gen. v. Bradford Canal*, L. R. 2 Eq. 71; *Oldaker v. Hunt*, 6 De Gex M. & G. 376; affirming s. c. 19 Beav. 485; *Lingwood v. Stowmarket Co.*, L. R. 1 Eq. 77; *Atty.-Gen. v. Colby, etc. Asylum*, L. R. 4 Ch. 146. In *Halsman v. Boiling Spring Bleaching Co.*, 1 McCarter, 335, the subject of the right of the riparian owners to relief in equity by way of injunction against any corruption or diversion of the water is extensively considered and discussed. It was declared that courts of equity maintain concurrent jurisdiction with courts of law in all cases of diversion of water or rendering it unfit for use, and that it is especially proper for courts of equity to interfere in that class of cases, where the pollution of watercourses operates to destroy health or to diminish the comfort of dwellings, the action at law affording no adequate redress, and an injunction being indispensable for that purpose.

² *Lux v. Haggin*, 60 Cal. 394.

³ *Heilbron v. The '76 Land, etc. Co.*, 80 Cal. 189. A statute giving the right to construct reservoirs for certain purposes, by providing that the owners thereof shall be liable for all damages arising from leakage therefrom, merely affirms a common-law principle, and does not take away the right to injunctive relief against the filling of a reservoir where the injuries suffered therefrom are irreparable. *Sylvester v. Jerome*, (Colo. Sup.) 34 P. 760.

poses or not. Aside then from the rights of parties under statutes authorizing the formation of irrigation and drainage districts, the laws of California, as interpreted by its highest court, are unsettled and unsatisfactory.

§ 304. **Equity protects Rights when ascertained.** — Without volunteering an attempt to state what the law is or should be on the questions opened up by the recent uses to which water is being devoted and the legislation concerning the same, it becomes easy and entirely proper to state that whatever the rights of parties when fixed by statutes or declared by courts, in construing statutes or interpreting the common law, it is the duty and province of courts of equity to protect these rights from infringement when once ascertained.¹

§ 305. **Diversion prevented.** — Since, from the nature of the case, the injurious effect of a diversion of water, to the deprivation of him having the right to its uninterrupted flow, is necessarily vague and incapable of accurate ascertainment, and consequently not susceptible of satisfactory adjustment in an action at law, it is held that continuous diversion of water from its bed is of itself an irreparable injury.² But it is necessary

¹ See *Dayton v. Rutherford*, 128 Ill. 271; 21 N. E. 198; *Kimberly v. Clark*, 75 Wis. 371; *Parry v. Citizens' W. W. Co.*, 13 N. Y. S. 471; *Tuolumne Water Co. v. Chapman*, 8 Cal. 392; *Corning v. Troy Factory*, 39 Barb. 311; *Williams v. Harten*, (Cal.) 53 P. 405; *Peterson v. City of Santa Rosa*, 51 P. 557; 119 Cal. 387.

MANDATORY INJUNCTION. — Under Laws 1817, c. 262, giving the canal commissioners power to take possession of and use any waters in the state necessary for the construction and use of a canal, "but doing, nevertheless, no unnecessary damage," the state in 1858 appropriated a dam at the outlet of a lake, with the right to use and store the water for canal purposes. From 1868 the canal commissioners maintained flush-boards at the dam; but in times of high water they were to be removed. In 1884 defendant was appointed superintendent of public works, and succeeded to the powers and duties of the canal commissioners, and had control of the dam; but instead of removing the flush-boards in times of high water, he allowed them to remain on the dam continuously, so as to cause the dam to overflow plaintiff's land, and refused to consider his complaints. *Held*, that plaintiff was entitled to a mandatory injunction directing defendant to cause the flush-boards to be raised from time to time, when in his (defendant's) judgment they should not be needed to store water for the use of the canals. *Wright v. Shanahan*, 61 Hun, 264; 16 N. Y. S. 785.

² *Moore v. Clear Lake Water Works*, 68 Cal. 150; *Conkling v. Pac. Imp. Co.*, 87 Cal. 196; *Tuolumne Water Co. v. Chapman*, 8 Cal. 392. See also, *Corning v. Troy, etc. Factory*, 39 Barb. 311; *Kimberly v. Clark*, 75 Wis. 371; *Last Chance, etc. Co. v. Heilbron*, 86 Cal. 1; 26 P. 523; *Crownen v. Wells-*

to distinguish between a diversion by one having no right to appropriate, and excessive appropriation to the injury of others also entitled to participate in the use of the water, by one having the right. In this case, to warrant an injunction, material injury from the excessive appropriation being or about to be made must be alleged and proved.¹ It is immaterial by what method the diminution of the volume of water is effected. Cases presenting almost innumerable circumstances have come before and been passed upon by the courts from time to time. An injunction was granted to prevent a landowner from diverting from its natural channel, and into a district ditch, water from his land which lay outside of the district;² to prevent a water-works company from diverting a running brook from the premises of a landowner depending upon it for a water supply.³ And a complaint which alleges that defendants threaten to divert the water from plaintiff's water-power, that defendants claim the right and have the ability to do it, and that they will do so, unless restrained, presents a case for the exercise of equitable jurisdiction to prevent a threatened injury.⁴

§ 306. *Nature of Injury.* — It is not required in order to entitle a party to relief against a wrongful diversion that he be injured in any particular manner and he may enjoin such act as well where active injury is caused by the overflow of diverted water,

ville Water Co., 3 N. Y. S. 177; *Amsterdam Knitting Co. v. Dean*, (Sup.) 43 N. Y. S. 29; 13 App. Div. 42; *Watuppa Reservoir Co. v. City of Fall River*, 147 Mass. 548; *Troe v. Larson*, (Iowa) 51 N. W. 179; *Holmes v. Calhoun County*, (Iowa) 66 N. W. 145; *Gilchrist v. Van Dyke*, 63 Vt. 75; 21 A. 1099; *Carpenter v. Gold*, (Va.) 14 S. E. 329; *Rigney v. Tacoma Light & Water Co.*, 38 P. 147; 9 Wash. 576. But see *Wintermute v. Tacoma Light & Water Co.*, (Wash.) 29 P. 444. Equity has no power to interfere with the carrying of water through a ditch or aqueduct for mining purposes for which its owner enjoys a priority of location. *Gregroy v. Nelson*, 41 Cal. 278.

¹ In *Ball v. Kehl*, 87 Cal. 505, which was an action by a subsequent appropriator of water for purposes of irrigation and domestic use to restrain its diversion when not needed by a prior appropriator for mill purposes, it was held that, an allegation that the defendant was continuing, and that he threatened to continue to divert the water when not needed for mill purposes, is material; and a finding that on a certain day the defendant deprived the plaintiff of the use of the water is insufficient to sustain an injunction, without a finding as to how long the deprivation continued, or as to whether the defendant threatened to continue it.

² *Dayton v. Rutherford*, 29 Ill. App. 31, affirmed 128 Ill. 271; 21 N. E. 198.

³ *Parry v. Citizens' Water-Works Co.*, 59 Hun, 196; 13 N. Y. S. 471.

⁴ *Kimberly & Clark Co. v. Hewitt*, 75 Wis. 371; 44 N. W. 303.

as where it results from the diminished supply.¹ Thus, the pulling down of banks of rivers so as to threaten the inundation of adjacent lands and destruction of mills, are grievances amply justifying injunctive relief.² And a landowner may have an injunction against a stranger who, under claim of right, is taking water from his canal by means of a ditch across his land, even though the amount of water taken is inappreciable, since its continued use would ripen into an easement in the land.³ And where the facts found show that, if not prevented, the continuous trespass of the defendants might by time ripen into a right adverse to the plaintiff, the plaintiff is entitled to an injunction to protect the superior right without proof or finding of damages, and a failure to find upon an issue tendered, as to damage result-

¹ *Haines v. Hall*, 17 Or. 165; 20 P. 831. In this case the facts were as follows: A small unnavigable stream flowed across the farm of W., and emptied into another stream, which during part of the year increased in volume so as to enable T. to float logs down it by stationing men along its banks to break jams, by arranging logs so as to confine the waters at points where the banks were not sufficient to prevent spreading, and constructing reservoirs above, and opening them to make a greater flow. Such use of the stream by T. resulted in destroying its banks, extending its width, diverting its waters, and causing them to overflow the land of W., which was in cultivation, and wash off the soil of his lands; T. claimed the right, and threatened to continue such practice, and W. had already sued a former party at law for attempting to exercise a similar right, and had recovered the sum of \$50 damages. *Held*, that equity should interfere and prevent T. from carrying his threats into execution.

CROSS-COMPLAINT. — In an action by a riparian owner to enjoin riparian owners above him from diverting the waters of a stream, defendants may file a cross-complaint to enjoin plaintiff from drawing off the water so as to prevent it from irrigating their land, as it would do in its natural flow, under Code Civil Proc. Cal. § 442, giving a defendant seeking affirmative relief affecting the property to which the action relates, the right to file a cross-complaint. *Van Bibber v. Hilton*, 84 Cal. 585; 24 P. 598, overruling *Heilbron v. Canal Co.*, 80 Cal. 189; 17 P. 933.

² *Robinson v. Byron*, 1 Bro. Ch. 588; *Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 706; *Lane v. Newdigate*, 10 Ves. 194; *Chalk v. Wyatt*, 3 Meriv. 688; *Martin v. Stiles*, Mosel. 145; *Gardner v. Village of Newburg*, 2 Johns. Ch. 165; *Van Bergen v. Van Bergen*, 2 Johns. C. R. 272; s. c. 3 Johns. Ch. 282; *Arthur v. Case*, 1 Paige, 448; *Belknap v. Trimble*, 3 Paige, 577, 600, 601; *Reid v. Gifford*, 1 Hopkins, 416. See also *Fisk v. Wilber*, 7 Barbour, 395; *Olmstead v. Loomis*, 6 Barb. 152; *Burden v. Stein*, 27 Ala. 104; *Frink v. Lawrence*, 20 Conn. 117; *Tuolumne Water Co. v. Chapman*, 8 Cal. 392; *Pollitt v. Long*, '58 Barb. 20.

³ *Walker v. Emerson*, 89 Cal. 456; 26 P. 968. To same effect is *Franklin v. Pollard Mill Co.*, 88 Ala. 318; 6 So. 685.

ing from the trespass, is immaterial, if no damages are given by the judgment.¹

§ 307. **Diversion of Overflow.** — On the same principle of preventing irreparable injury equity will interfere to restrain the maintenance or continuance of any dam or other obstruction which causes the waters of a stream to overflow its banks and injure residents in the neighborhood either in health or property.² But the right to relief being based upon the fact that the injury is irreparable, the nature of the injury must be specifically alleged and proved.³ A party may be estopped by his acquiescence in the erection of a dam or other structure from afterwards objecting to its maintenance. Thus, where complainant had stood by until after proceedings had been concluded under a statute to ascertain whether the owners of lands above and below the dam had been injured, made no objection to the erection of the mill until considerable money had been expended, and had no intention of raising a mill himself, he was held not entitled to an injunction to prevent the flowing back of water on his land.⁴ And generally where permission to erect a dam has been applied for and granted under the authority of and in the manner prescribed by law, and the dam has been erected in compliance with such permission, its maintenance cannot be interfered with by the courts, in the absence of fraud.⁵

§ 308. **Obstructing Natural Flow.** — An injunction lies to prevent any obstruction or pollution of a watercourse to the serious or irreparable injury of those residing on or near its banks, or having a right to the use of the waters for milling and other

¹ *Mott v. Ewing*, 90 Cal. 231.

² *Minor v. De Vaughan*, 72 Ga. 208; *Robinson v. Byron*, 1 Bro. C. C. 588; *Atty.-Gen. v. Eau Claire*, 37 Wis. 400. *Shields v. Orr Extension Ditch Co.*, (Nev.) 47 P. 194, where an increase in the height of a mill-dam caused sickness in complainants' families. Injunction granted against the construction of a mill-dam so as to unlawfully raise the water over plaintiff's land. *White v. Forbes*, 1 Walk. (Mich.) 112; *Whitfield v. Rogers*, 26 Miss. 84. The practice of a court of equity as to its preliminary and final relief upon a bill filed, in modern times, to abate a nuisance, as the flow of water upon land from an alleged unauthorized building or raising of a mill-dam, explained and illustrated, and compared with the practice of the court in the times of Lords Hardwicke and Thurlow. *Sprague v. Rhodes*, 4 R. I. 301. See *Glass v. Clark*, 53 Ga. 380.

³ *Blain v. Brady*, 64 Md. 373; 1 A. 609; *Verney v. Pope*, 60 Me. 192.

⁴ *Nesser v. Seeley*, 10 Neb. 460.

⁵ *McLaughlin v. Hope Mills Manuf. Co.*, 103 N. C. 100; 9 S. E. 307.

purposes.¹ Thus, an injunction was granted to restrain a defendant from preventing water flowing in regular quantities, as it had originally done, to a mill, the Lord Chancellor saying that he would not restrain what had been enjoyed for twenty years past; but if what had been so enjoyed was used in a different way, so as to do mischief, the court might interpose.²

No rights can be acquired by reason of an obstruction caused by a flood or freshet unless the maintenance of the obstruction be assented to by the parties affected by it. And it was held that though the natural flow of water after a stream was obstructed only reached plaintiff's land on occasions of freshets, yet, when the flow of water was increased by the removal of the obstructions by defendants, the increase of flow accrued to the benefit of plaintiff, and not to that of defendants, who had no right to the natural flow.³

§ 309. **Obstructions in Bayou.** — The same principles apply to bayous of a permanent character formed by overflow in times of freshet, as to the main channels of watercourses, and riparian proprietors will be entitled to have restrained the placing of obstructions therein to their injury. And one owning to the centre of a bayou may maintain a bill for injunction against one who, claiming under an agreement with the plaintiff's grantor, obstructs the bayou by using it as a booming ground for saw-logs.⁴

§ 310. **Injury to Mills above.** — On the same principle of preventing irreparable mischief and furnishing a more complete and adequate remedy than is attainable at law, equity will restrain a party from maintaining a mill-dam, to the destruction or serious injury of complainant's already vested rights in a mill privilege higher up the stream.⁵ But to warrant relief in such a case, the nature of the injury must be clearly set forth, to enable the court to determine whether it is in fact not susceptible of computation. Nor does a complaint state any cause of action in

¹ *Canfield v. Andrew*, 54 Vt. 1; s. c. 41 Am. Rep. 828. Relief against railroad company for insufficient culvert. *Lake Erie & W. R. Co. v. Young*, (Ind. Sup.) 85 N. E. 177.

² *Robinson v. Byron*, 1 Bro. C. C. 588. An injunction is properly granted to restrain the continuance of a dam by which certain water is forced upon the plaintiff's mill, or to the lower dam. *Rothery v. New York Rubber Co.*, 24 Hun (N. Y.), 172.

³ *Paige v. Rocky Ford Canal & Irrigation Co.*, 83 Cal. 84; 21 P. 1102.

⁴ *Turner v. Holland*, 54 Mich. 300.

⁵ *Bemis v. Upham*, 18 Pick. (Mass.) 169.

favor of a private corporation, that makes use of water-power furnished by a river, where it alleges that a building will obstruct the flow of the water, and cause it to back up to the place where the water is discharged from complainant's water-wheels, "to some extent," but fails to allege any injury on account of it.¹

§ 311. **Mills on same Stream.**—Equity interposes by injunction to preserve and protect the granted and prescriptive rights of mill-owners, having sites on watercourses, in the use of the waters thereof for motive power. And as between one above and others below on the same stream, the former has a right to use the water in working his mill to the best advantage, subject however to the limitations that in the exercise of this right those below cannot be totally deprived of water to the extent of rendering their investment useless and unproductive; and equity will intervene and enforce a fair participation according to the circumstances of each case, such as the size of the stream and number of mills.² In the case of mills erected on opposite sides of a stream, and in the absence of contrary granted or prescriptive rights, the owner on each side is entitled to an equal share of the water, or so much thereof as is necessary for his mills if less than a moiety is sufficient, if there is not sufficient water to afford a full supply for all. In such cases if one mill-owner attempts to deprive the other of his share of the water, equity will interfere by injunction to enforce a proper division.³ Ac-

¹ *City of Janesville v. Carpenter*, 77 Wis. 288 ; 46 N. W. 128.

² *Merritt v. Brinkerhoff*, 17 Johns. (N. Y.) 306; *Merritt v. Parker*, Cox, 460; *Mabie v. Mattison*, 17 Wis. 1; *Davis v. Getchell*, 50 Me. 604; 3 Kent's Com. 440, note; *Casebeer v. Mowry*, 55 Pa. St. 423; *Ferrea v. Knipe*, 28 Cal. 343; *Springfield v. Harris*, 4 Allen (Mass.), 496; *Tyler v. Wilkinson*, 4 Mason (U. S.), 401; *Blanchard v. Baker*, 8 Greenl. (Me.) 253; s. c. 28 Am. Dec. 504; *Palmer v. Mulligan*, 3 Cai. (N. Y.) 807; s. c. 2 Am. Dec. 270; *Sackrider v. Beers*, 10 Johns. (N. Y.) 20; *Dilling v. Murray*, 6 Ind. 324; *Batavia Manuf. Co. v. Newton Wagon Co.*, 91 Ill. 245; *Tucker v. Jewett*, 11 Conn. 311, 317, 324; *Ingraham v. Hutchinson*, 2 Conn. 584; *Mason v. Hill*, 5 Barn. & Adol. 1; *Bealey v. Shaw*, 6 East, 208; *Brown v. Best*, 1 Wils. 174; *Saunders v. Newman*, 1 Barn. & Adolph. 258; *Cary v. Daniels*, 8 Met. (Mass.) 466, 478; *Wheatley v. Chrisman*, 24 Pa. St. 298; *Gillett v. Johnson*, 30 Conn. 183; *Pollitt v. Long*, 58 Barb. (N. Y.) 20; *Wentworth v. Poor*, 38 Me. 243; *Clark v. Rockland Water Power Co.*, 52 Me. 78; *Chandler v. Howland*, 7 Gray (Mass.), 348; *Angell on Water-courses* (3d ed.), sec. 115; *Hoxsie v. Hoxsie*, 38 Mich. 77.

³ *Arthur v. Case*, 1 Paige (N. Y.), 447; *Case v. Haight*, 3 Wend. (N. Y.) 632. In the last case the court say: "It is not denied that the effect of the dam in question, when completed, will be to divert a large proportion of the water from the mills of the respondents; nor is it denied that it is the inten-

cordingly, an injunction will be granted to restrain one mill-owner from keeping his gates open and allowing water to run to waste where another on the opposite side of the stream taking water from the same source has a right to all the water not required by the defendant's mill.¹ And where a judgment in the proceeding for the partition of water-power prescribes the method of use, a party to the proceeding may be enjoined from otherwise using the water.² But the owner of a right to draw water from a dam and pond to maintain his mill, has no right of injunction to prevent the right of repair of the dam and pond in a manner which omits to provide for the water-gate and flume, as formerly existing for the use of the owner of the right, when it appears that the manner of repair sought to be enjoined will not practically diminish the privilege hitherto enjoyed.³ In these as in other cases of dispute between mill-owners, the injury resulting from interference with complainant's right must be shown to be irreparable in damages at law in order to entitle him to relief in equity.⁴

§ 312. **Interference with Reconstruction of Dam.** — While equity is zealous to protect the rights of riparian owners against infringements by means of unlawful diversions and obstructions, it will, in a proper case, extend its aid for the protection of those having a right to maintain dams, and will prevent interference with the reconstruction of a dam by one having a prior vested right to do so. An injunction was granted in accordance with the prayer of a complaint which alleged that a dam had been built by authority of the legislature and maintained for forty years; that it had been destroyed by the wrongful act of defendant; that unless rebuilt great damage would result to plain-

tion of the appellants, if not restrained, to complete the dam; it was therefore a case for a preliminary injunction, as the injury might be irreparable."

¹ Fuller v. Daniels, 63 N. H. 395.

² Mulberger v. Koenig, 62 Wis. 558.

³ Webb v. Laird, 59 Vt. 108; 7 A. 465.

⁴ Westbrook Manuf. Co. v. Warren, 77 Me. 437; 1 A. 246, holding that a complaint alleging that defendants, mill-owners on the opposite side of a stream, had within ten days commenced to use and were continuing to use, and threatening to use in the future, more water than they were lawfully entitled to, thereby depriving plaintiffs of sufficient water to run their mill and obliging them to shut down portions of it, did not show such a permanent or irreparable injury as to justify an injunction. See also Fairhaven Marble, etc. Slate Co. v. Adams, 46 Vt. 496.

tiff, but it would not injure defendant; and asked a preliminary order restraining defendant from interfering with the rebuilding and maintaining of the dam.¹

§ 313. **Pollution of Streams.** — An important use of the remedy by injunction to protect the rights of riparian owners is in restraint of acts and things which pollute and render unwholesome, or useless for the purposes to which they have been usually devoted, the waters of streams. Where an ancient stream of water, which a man has the right to use, flowing upon his estate, is perceptibly polluted by sewage being discharged into such stream or water-course, and such sewage prevents such owner using the stream, the owner of the estate may come to the court of chancery to restrain the pollution, and stop such discharge before it has become a permanent and continuous nuisance, and while the pollution is gradually increasing by an increased flow of sewage; and although the fact of prospective nuisance is not in itself a ground for the interference of the court, yet if some degree of present nuisance exists, the court will take into account its probable continuance and increase.² On this principle an injunction was granted to the owner of a trout pond to restrain the further pollution of the stream supplying the pond whereby his fish were destroyed.³ And in a suit brought by public officers or a public board against a city to prevent the construction of sewers in such a way as to pollute the source of water supplied to the inhabitants of the city, a preliminary injunction should issue, though the city,

¹ *Pioneer Wood-Pulp Co. v. Bensley*, 70 Wis. 476; 36 N. W. 321.

² *Goldsmid v. Tunbridge Wells Imp. Commrs.*, L. R. 1 Ch. App. 349. See also *Lewis v. Stein*, 16 Ala. 214; *Wood v. Sutcliffe*, 8 Eng. Law & Eq. 217. See *Lingwood v. Stowmarket Co.*, L. R. 1 Eq. 77, 336; *Attorney-General v. Richmond*, L. R. 2 Eq. 306; *Attorney-General v. Leeds Corporation*, L. R. 5 Ch. App. 583; *Holt v. Corporation of Rochdale*, L. R. 10 Eq. 354; *Clowes v. Staffordshire P. W. Co.*, L. R. 8 Ch. App. 125; *Babcock v. New Jersey, etc. Co.*, 5 C. E. Green, 296.

³ *Seaman v. Lee*, 17 N. Y. Sup. Ct. 607. An order restraining persons from polluting a stream should restrain them from such a pollution as would be to the injury of the plaintiff. *Lingwood v. Stowmarket Co.*, 11 Jur. N. S. 993. Where the grounds of an action are that defendant has no right to dam a stream so as to deprive a plaintiff of the use of the water, and that he has no right to permit hogs to have free access to it, and the evidence follows the same theory, a decree enjoining defendant from "so damming or obstructing the natural flow of the creek as that the same shall have become stagnant or foul in any manner, so that the water shall be unwholesome for the use of plaintiff's stock," cannot be sustained. *Spence v. McDonough*, (Iowa) 32 N. W. 371.

by its answer and accompanying affidavits, denies the charge that the sewage will affect complainant's water supply.¹ So where defendant, an upper riparian owner, kept a large number of cattle, the droppings from which were conveyed to a stream by means of sewers, and carried by the stream down upon plaintiff's land, immediately adjoining, whereby its waters were rendered unfit for use, and an atmospheric nuisance was created, it was held, that defendant would be enjoined from continuing such nuisance although the stream was simply an ordinary creek.² But an injunction should not ordinarily be granted to prevent such fouling of mere brooks and creeks as unavoidably results from the legitimate use of one's property, where the loss and injury to him from granting the injunction exceeds or is only equal to that of complainant.³

§ 314. **Hydraulic Mining Debris.** — The owner of hydraulic mines, situate on the banks of an unnavigable stream which empties its waters into a navigable river within the state, has no right to dump hydraulic debris into the stream, to the endangerment of habitation and cultivation of large tracts of country upon which are cities, towns, and villages, and to the impairment of the navigation of such river. Acts of this nature constitute a public nuisance, which may be enjoined in an action in the name of the people of the state, although other mining companies, acting separately and independently of each other, contribute in producing such nuisance.⁴

§ 315. **Percolation of Noxious Waters.** — An injunction will issue to restrain the fouling of one's water supply by permitting noxious water to percolate through the soil into springs, wells, and streams. Thus, an injunction was granted against defendants, who moved a worsted mill near plaintiff's property, and allowed noxious and offensive refuse water to flow from his mill into an old pit on his own land, where it percolated underground to plaintiff's colliery and injured the health of his employees.⁵ So

¹ Newark Aqueduct Board v. City of Passaic, 46 N. J. Eq. 553; 22 A. 55. See also Daniel v. Town of Princeton, (Ky.) 22 S. W. 824; Cushman v. Highland Ditch Co., (Colo. App.) 33 P. 344; Graves v. Gas Co., 83 Iowa, 714.

² Barton v. Union Cattle Co., 28 Neb. 850; 44 N. W. 454.

³ Supra, § 23.

⁴ People v. Gold Run Ditch & Min. Co., 66 Cal. 138; 4 P. 1152.

⁵ Turner v. Murfield, 34 Beav. 390. See also Ballard v. Tomlinson, L. R. 29 Ch. Div. 119; Pottstown Gas Co. v. Murphy, 39 Pa. St. 257; Columbus Gas Light & Coke Co. v. Freeland, 12 Ohio St. 392.

where the defendant allowed noxious and offensive refuse-water to flow from his factory into an old pit on his own land, but which percolated underground into the plaintiff's colliery, he was restrained by a perpetual injunction.¹

§ 316. **Prescriptive Rights.** — It may be doubted whether one may by user and acquiescence acquire the right to corrupt the waters of a stream, even though the rights affected are strictly private, to the extent of rendering them unfit for the ordinary uses of the household and a farm conducted according to the usual methods. Assuming that a prescriptive right to do so could be acquired, it could only be by the continuance of a perceptible amount of injury for twenty years at common law or for the prescriptive period fixed by statute.² If a prescriptive right to foul a stream may be acquired at all, the fouling must not be considerably enlarged to the prejudice of other people, and the fact that the stream is fouled by others is not a defence to a suit to restrain the fouling by one.³ The mere suspension of the exercise of a prescriptive right is not sufficient to destroy the right without some evidence of an intention to abandon it; but where dye-works had not been used for more than twenty years, and had been allowed to go to ruin, the court held that any right of fouling a stream attached to them was lost.⁴

§ 317. **Navigable Streams.** — Navigable streams are public highways, and an owner of land bordering on such a stream has a right to free access thereto, nor can he be deprived of such right without compensation; and any interference with the enjoyment thereof, as by the erection of a wharf cutting off his right of access, is a nuisance, and may be restrained by injunction.⁵ And an injunction to forbid longer maintenance of a boom upon a river may be granted, where the boom infringes the rights of a neighboring shore-owner, as by causing logs to run against and lie upon his banks, damaging them and preventing his access.⁶

¹ *Turner v. Murfield*, 34 Beav. 390.

² *Goldsmid v. Tunbridge Wells Improvement Commissioners*, L. R. 1 Eq. 161.

³ *Crossley v. Lightowler*, L. R. 2 Ch. 478; L. R. 8 Eq. 279.

⁴ *Ibid.*

⁵ *Shirley v. Bishop*, 67 Cal. 543; 8 P. 82. For cases of injunction against obstructions in navigable stream, see *Mayor, etc. of New York v. Bamberger*, 7 Robt. 219; *Hudson Riv. R. R. Co. v. Loeb*, *Ib.* 418.

⁶ *Cotton v. Mississippi & Rum River Boom Co.*, 19 Minn. 497.

INJURIES TO LAKE SHORE. — Plaintiffs, owners of land adjacent to the

So a riparian owner whose property will be injured thereby may maintain a bill to enjoin the erection of a bridge over a tidal and navigable river, although not immediately interested in its navigation.¹

§ 318. **Drawing off Waters of Navigable Lake or River.** — One specially injured thereby may enjoin the drawing off of the waters of a lake, though the same be navigable and complainant have no interest in its navigation; as where complainant was the owner of property on the shores of a lake which was valuable as a pleasure resort on account of its nearness to the lake and easy access to the water for boating and fishing, and a corporation was about to draw the water out of the lake so as to lower its level and leave a wide margin of bog exposed around its banks, which was repulsive in appearance and unhealthy, and therefore injurious to plaintiff's property.² But it has been held that an injunction would not lie to prevent the drainage of a navigable river to such an extent as to interfere with and impede navigation.³ An injunction lies, however, against drainage commissioners who exceed their authority and injure other persons.⁴

§ 319. **Water on Public Lands.** — Whether equity will enjoin an interference with the rights of the first appropriator of running water on public mineral lands in the Pacific states and territories depends upon considerations which ordinarily govern courts of equity in the exercise of such jurisdiction.⁵ But where defendants owning lands below plaintiff objected to the granting of an injunction on the ground that, when plaintiff's land was public land, they owned land below it, and claimed the right to use the water of the streams for irrigation purposes, from April to November, and the court's findings did not show that defendants needed

lake shore, sued to enjoin defendants from dredging and removing the sand from the bed of the lake opposite their property, on the ground that these acts caused erosions on the shore line, and diminished the material accretions to which plaintiffs were entitled. *Held*, that, as plaintiffs did not show by their evidence either an actual injury incurred, or that it was certainly impending, the injunction would not be granted. *Blatchford v. Chicago Dredging & Dock Co.*, 22 Ill. App. 376.

¹ *Gilman v. Philadelphia*, 3 Wall. 713.

² *Cedar Lake Hotel Co. v. Cedar Lake Hydraulic Co.*, 79 Wis. 297; 48 N. W. 371. See also *Crescent Mill & Trans. Co. v. Hayes*, (Cal.) 8 P. 692.

³ *Atty.-Gen. v. Great Eastern R. Co.*, L. R. 6 Ch. 572.

⁴ *Belnap v. Belnap*, 2 Johns. (N. Y.) Ch. 463.

⁵ *Atchison v. Peterson*, 20 Wall. 507; *Basey v. Gallagher*, 20 Wall. 670.

during the winter season more water than was left them, and it appeared that they had got along with it for a number of years, it was held that an injunction was properly granted.¹

§ 320. **Draining Source of Reservoir — Injury from draining Mine.** — Preventive relief will be granted upon well-established principles to prevent irreparable injury being or about to be inflicted by drawing or draining off springs relied upon for supplies of water. Thus, where plaintiff owned an aqueduct for supplying water to others, which was fed by certain springs, including the one in question, and defendant's interference with the latter spring was shown to be a continuing injury, and would render the supply uncertain, though it could not be shown precisely to what extent, it was held there was no adequate remedy at law, and injunction would lie.²

Where the barrier between two mines had been perforated, and the owner of one of them had artificially conducted his water so as to pass by the perforation into the other, that mode of removing it from his mine being most beneficial to himself, thereby causing irreparable injury to the plaintiff, Vice-Chancellor (Sir W. P. Wood) held, that the court would on an interlocutory application grant a mandatory injunction, so as to keep things in the state (that is to say, oblige them to be restored to the state) in which they were *ante litem motam*, until the hearing.³

§ 321. **Surface-Waters — Rule of Civil Law.** — The law with respect to injunction against diversions and appropriations of surface-waters is in a somewhat unsettled state. The fundamental idea underlying the common law on the subject is that in the matter of rainwater and drainage, the respective rights of the parties are the same and the same rule governs as in the case of running streams, — they follow nature.⁴ But the rule of the civil law has been adopted in many states and appears to be gaining favor. The civil-law rule "really rests on a two-fold basis,

¹ *Stowell v. Johnson*, (Utah) 26 P. 290.

² *Gilchrist v. Van Dyke*, 63 Vt. 75; 21 A. 1099. See also *Ambrose v. City of Buffalo*, (Super. Buff.) 20 N. Y. S. 129; 29 Abb. N. C. 140.

³ *Westminster, etc. Co. v. Clayton*, 36 L. J. (Ch.) 476.

⁴ *Martin v. Riddle*, 26 Pa. St. 415. The owner of upland through which a stream flows will be restrained from changing the natural course of the stream to protect his meadow, where such change would so increase the current of the stream as to damage the mill-dam of the owner of the lower land by washing the banks and filling the dam with sediment. *Kay v. Kirk*, (Md.) 24 A. 826.

though there has usually been only one reason assigned for it. It arises at once from the natural situation of the lands, and the operation of the maxim *sic utere tuo ut alienum non lædas*. Being owner of the lower lands, the proprietor is by law bound to permit the unobstructed flow of surface-waters across them from the higher, and thus is under obligation to do no act which, by damming back the waters, could injure the upper proprietor. To express the rule in another form, the lands of the lower or servient proprietor are subject to a natural servitude under which he is obliged to receive from the lands of the upper or dominant tenement the surface-waters which naturally flow therefrom. The right arises from the natural situation of the ground.”¹

§ 322. **Same — Common-law Rule.** — On the other hand, by the common law there is an unrestricted right to change the course or obstruct the flow of mere surface-waters by the erection of embankments, the construction of drains, or by any other means the owner of the land whereon such surface-water may flow or be found may see fit to adopt, and which conduce to the beneficial enjoyment of his estate. This rule has been adopted in several of the states.² But while the right is unlimited in its

¹ J. C. Thompson, in an article in 23 Am. L. Rev. pp. 372, 384, citing authorities. In *Kauffman v. Griesemier*, 26 Pa. St. 407, it was said: “Almost the whole law of water-courses is founded on the maxim of the civil law, *aqua currit et debet currere*. Because water is descendible by nature, the owner of a dominant or superior heritage has an easement in the servient or inferior tenement for the discharge of all waters which by nature rise in or fall upon the superior. There are both American and English *dicta* in opposition to the rule of these cases, though the question seems not to have been directly passed upon by other courts. See *Greenleaf v. Francis*, 35 Mass. 18 Pick. 117; *Wheatley v. Baugh*, 25 Pa. St. 528; s. c. 64 Am. Dec. 721; *Haldeman v. Bruckhart*, 45 Pa. St. 514; s. c. 84 Am. Dec. 511; *Acton v. Blundell*, 12 M. & W. 336. Following are some of the authorities which support the civil-law rule in regard to surface-waters: *Farris v. Dudley*, 78 Ala. 124; s. c. 56 Am. Rep. 24; *Crabtree v. Baker*, 75 Ala. 91; s. c. 51 Am. Rep. 424; *Ogburn v. Connor*, 46 Cal. 346; s. c. 13 Am. Rep. 213; *Goldsmith v. Elsass*, 53 Ga. 186; *Total v. Bonnefoy*, 123 Ill. 653; *Peck v. Harrington*, 109 Ill. 611; *Livingston v. McDonald*, 21 Iowa, 160; *Drake v. Chicago, R. I. & P. R. Co.*, 70 Iowa, 59, 61; *Minor v. Wright*, 16 La. An. 151; *Hays v. Hays*, 19 La. 351; *Philadelphia, W. & B. R. Co. v. Davis*, 10 Cent. Rep. 551; *Boyd v. Conklin*, 54 Mich. 583; *Boynton v. Longley*, 19 Nev. 69; 8 Am. St. Rep. 781; *Porter v. Durham*, 74 N. C. 767; *Overton v. Sawyer*, 1 Jones, L. 308; *Tootle v. Clifton*, 22 Ohio St. 247; *Crawford v. Rambo*, 4 West Rep. 445; *Butler v. Peck*, 16 Ohio St. 334; *Kauffman v. Griesemier*, 26 Pa. St. 407; *Hays v. Hinklemen*, 68 Pa. St. 324; *Louisville & N. R. Co. v. Hays*, 11 Lea, 382; *Carriger v. East Tennessee, V. & G. R. Co.*, 7 Lea, 388.

² *Chadeayne v. Robinson*, 55 Conn. 345; *Murphy v. Kelly*, 68 Me. 521;

beneficial exercise, it must not be wantonly, maliciously, or vexatiously used to the infliction of great or irreparable injury to others. Courts of equity will generally restrain such flagrant misuse of proprietorship, although it has been held that no action at law lay for the appropriation or diversion of surface or percolating waters even when made purely out of malice and for the purpose of injuring a neighbor.¹ In applying the common-law rule it is immaterial that the land is not really wet and swampy. A coterminous proprietor may, nevertheless, change the situation or surface of the land by raising or filling it to a higher grade, by the construction of dykes, the erection of barriers, or other structures calculated to cause water to accumulate on adjacent land, and prevent it from passing off over the surface. And it follows as a natural sequence of this rule that though such acts may cause detriment or loss to others, they are *damnum absque injuria*, and afford no ground for an injunction.²

§ 323. *Relief in Equity.* — But while courts of equity as a rule

Morrison v. Bucksport & B. R. Co., 67 Me. 352; *Cairo & Vincennes R. Co. v. Stevens*, 73 Ind. 278; s. c. 38 Am. Rep. 139; *Gibbs v. Williams*, 25 Kan. 214; s. c. 37 Am. Rep. 241; *Kansas City & E. R. Co. v. Riley*, 33 Kan. 374; *Rathke v. Gardner*, 134 Mass. 14; *Macomber v. Godfrey*, 108 Mass. 219. See also *Shane v. Kansas City, etc. R. Co.*, 71 Mo. 237; s. c. 36 Am. Rep. 48; *Benson v. Chicago & A. R. Co.*, 78 Mo. 504; *Swett v. Cutts*, 50 N. H. 439; s. c. 9 Am. Rep. 276; *Bowlsby v. Speer*, 81 N. J. L. 351; *Lord v. Carbon Iron Manuf. Co.*, 42 N. J. Eq. 157; *Barkley v. Wilcox*, 86 N. Y. 140; s. c. 40 Am. Rep. 519; *Lynch v. Mayor, etc.*, 76 N. Y. 60; s. c. 32 Am. Rep. 271; *Harwood v. Benton*, 32 Vt. 724; *Wakefield v. Newell*, 12 R. I. 75; *Beard v. Murphy*, 37 Vt. 99; *Lessard v. Stram*, 62 Wis. 112; *Hanlin v. Chicago & N. W. Ry. Co.*, 61 Wis. 515. A leading case in support of this rule is that of *Gannon v. Har-dagon*, 92 Mass. 106, when it was said: "The right of a party to the free and unfettered control of his own land above, upon, and beneath the surface, cannot be interfered with or restrained by any considerations of injury to others which may be occasioned by the flow of mere surface-water in consequence of the lawful appropriation of the land by its owner to a particular use or mode of enjoyment. Nor is it at all material, in the application of this principle of law, whether a party obstructs or changes the direction and flow of surface-water by preventing it from coming within the limits of his lands, or by erecting barriers or changing the level of the soil, so as to turn it off in a new course after it has come within his boundaries. The obstruction of surface-water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does not act inconsistently with the due exercise of dominion over his own soil."

¹ *Phelps v. Nowlen*, 72 N. Y. 39; *Chatfield v. Wilson*, 28 Vt. 53. See *Harwood v. Benton*, 32 Vt. 737.

² *Dickinson v. Worcester*, 7 Allen (Mass.), 22; *Swett v. Cutts*, 50 N. H. 439; s. c. 9 Am. Rep. 276.

follow the legal right, and ordinarily refuse relief unless the complainant would be entitled to recover damages in an action at law for the act to be restrained, yet such courts, even in the states where the common-law rule in regard to surface-water, prevails, will, in a case of hardship and gross injustice in disposing of surface-water by one on his own land, to the serious and irreparable prejudice of another, base jurisdiction upon the fraudulent and inequitable abuse of a legal right, or sometimes invoke the more reasonable principles of the civil law and furnish a remedy by injunction.¹

§ 324. **Obstructing Natural Flow.** — Courts of equity will — where they assume to interfere at all in the disposal of and dealing with surface-waters — enjoin the obstruction of the natural flow where the owner of the dominant tenement has capriciously and unreasonably detained it in its natural and usual course upon and over the lower lands of another who has by long enjoyment and user become entitled to the undiminished and natural flow of the same. And where one erects an embankment upon his own land which prevents the surface-water on the land of another from flowing in its natural course, and causes it to overflow the latter's land, it amounts to a nuisance entitling the party to relief in equity without showing actual damage.² Under similar circumstances equity will restrain by injunction the disturbance of a perpetual right of a landowner to have an artificial watercourse maintained from his neighbor's land to his own.³ The same right to equitable relief exists in favor of one owning a lot in a town or city; and such person will be granted an injunction to prevent injury to his property by the filling up of a ditch and changing the course of surface-water over it.⁴ On

¹ See *Jacobson v. Van Boening*, (Neb.) 66 N. W. 993.

² *Tootle v. Clifton*, 22 Ohio St. 247; *Stewart v. Schneider*, 22 Neb. 286. See also *Kauffman v. Griesemier*, 26 Pa. St. 407. Compare *Bowlsby v. Speer*, 2 Vroom (N. J.), 351; *Bailey v. Schnitzius*, 45 N. J. Eq. 178; 16 A. 680. Where a ditch, which has been extended a part of the distance only intended by an agreement of the owners of land, is allowed to fill up for many years, and its reopening would increase the flow of water on and over the lower ground beyond the natural flow, to the injury of such grounds, injunction will lie, at the suit of a subsequent purchaser of the lower grounds, to prevent its reopening. *Miller v. Hayden*, (Ky.) 15 S. W. 243; Id. 667.

³ *Bitting's Appeal*, 105 Pa. St. 517. As to right to enjoin the filling up of a ditch opened by commissioners, see *Simpson v. Wright*, 21 Ill. App. 67.

⁴ *Ross v. Mackeney*, (N. J.) 18 A. 685.

the other hand the owner of an easement for the discharge of surface-water drained from his land, by open ditch, to the land of another, may change the ditch to a tile drain, and is entitled to a perpetual injunction against obstructions to the discharge on the adjoining land, where the flow of water has not been increased by the change.¹

§ 325. **Same Subject — Drainage.** — In regard to disposing of surplus waters on one's own land, a somewhat different question is presented than that in the case of obstructing the natural flow; for water has been said to be a common enemy of mankind (meaning sea water, however);² and it is the natural right of each and all to resort to the most expedient and effective means of getting rid of any excesses of it. Accordingly it has been frequently held that an upper proprietor may, in the exercise of his right to the reasonable use of his lands, drain surface-waters into a stream into which they would naturally flow, although the result may be to increase materially the volume of water flowing through the lands of the lower riparian owners;³ but it is otherwise if the outlet adopted be not that which forms the natural drainage.⁴ For while an owner of an upper parcel of land has a right to the natural flow of water from his own to and upon a lower parcel, yet he may be enjoined from conducting surface-water by artificial drains upon the lower parcel in such manner as to cause serious injury.⁵ And the owner of land on which there is a reservoir of surface-water may be restrained from discharging it through an artificial channel directly upon the land of another, to his damage.⁶

§ 326. **Same Subject — Discharge from Reservoir.** — A landowner

¹ *Davidson v. Hutchinson*, 44 N. J. Eq. 474; 15 A. 819.

² *Rex v. Commrs. of Sewers*, 8 B. & C. 355, 860, per Lord Tenterden.

³ See *supra*, § 321, and cases cited.

⁴ *Waffle v. New York Central R. Co.*, 53 N. Y. 11; s. c. 13 Am. Rep. 467. Injunction will not lie against the digging of a ditch where it conclusively appears that the ditch had merely increased the natural flow of water, had done no damage, nor increased the drainage area. *Jeffers v. Jeffers*, 107 N. Y. 650; 14 N. E. 316. See *Holmes v. Upton*, L. R. 9 Ch. 214.

⁵ *Livingston v. McDonald*, 21 Iowa, 160; *Butler v. Peck*, 16 Ohio St. 835; *Laumier v. Francis*, 23 Mo. 181.

⁶ *Miller v. Laubach*, 47 Pa. St. 154; *Rawstron v. Taylor*, 11 Exch. 662; *Wheatley v. Baughm*, 25 Pa. St. 528; *Buffum v. Harris*, 5 R. I. 243; *Curtiss v. Ayrault*, 47 N. Y. (2 Sick.) 73; *Smith v. Fletcher*, L. R. 7 Exch. 305; s. c. 3 Eng. R. 305; *Ellis v. Duncan*, cited in *Goodale v. Tuttle*, 29 N. Y. 466; *Broadbent v. Ramsbotham*, 11 Exch. 662.

may acquire by user or by contract, express or implied, an easement in an artificial body of surface-water, a deprivation or serious disturbance of which will be enjoined. Thus, it was held that equity would restrain the owner of land from draining a body of surface-water collecting naturally in a depression, principally on complainant's land, but covering also a small part of defendant's land, situated higher than complainant's, and which was used by complainant to float logs to his mill, though the water came from defendant's land, and complainant had increased the size of the body by constructing a dam on his own land, the natural collection of the water being prevented thereby.¹ So if a ditch, which has been extended a part of the distance only intended by an agreement of the owners of land, is allowed to fill up for many years, and its reopening would increase the flow of water on and over the lower ground beyond the natural flow, to the injury of such grounds, injunction will lie, at the suit of a subsequent purchaser of the lower grounds, to prevent its reopening.²

§ 327. **Maintenance of Dam a Continuing Wrong.** — The rule that a past or completed act is not ground for a preventive or mandatory injunction does not apply where it is sought to enjoin the

¹ *Alcorn v. Sadler*, 66 Miss. 221; 5 So. 694; *Anderson v. Henderson*, 124 Ill. 164; 16 N. E. 232. Compare *Sylvester v. Jerome*, (Colo. Sup.) 34 P. 760. In *Anderson v. Henderson* it appeared that complainant and defendant owned adjoining farms of nearly the same level, that on the defendant's lands were large ponds, and that defendant, in order to drain his land, cut a ditch at a place which was higher than the surrounding land, and known as the "divide" between the two farms, causing water to flow from its natural course upon complainant's land. Complainant brought an action at law for damages, but consented to a nominal verdict on defendant agreeing to fill up the ditch. Subsequently defendant repeatedly threatened to reopen it. *Held*, that complainant was entitled to an injunction. But where, in a suit to restrain defendant from maintaining a dam on his premises, it appeared that the water in the pond must rise more than seven inches before it would set back on plaintiff's land; that in the ordinary flow of the stream the land would not be flooded; but that sudden and severe rains in the spring and fall, or sudden melting of snow, would cause the pond to fill, and the water to overflow on plaintiff's land, — it was held that, if defendant was liable for such overflows, still there was not evidence of irreparable damage. *Smith v. King*, (Conn.) 23 A. 923.

² *Miller v. Hayden*, (Ky.) 15 S. W. 243; Id. 667. But it was held in the same case that, where complainant's vendor consented to the original digging of the ditch, and at the time of the purchase by complainant small quantities of water were passing through it, the owners of the upper land cannot be compelled to stop the flow of water altogether, but only to refrain from cleaning the ditch out.

maintenance of a dam, which has already been fully constructed, and which causes an overflow on plaintiff's land, since not only the building of the dam, but its continuance, is the act complained of.

Nor can the fact that defendants have not, since constructing the dam, done any act or asserted any right to maintain it, defeat plaintiff's right to an injunction, on the ground that an injunction can only issue in case of a continuing trespass or nuisance, since, while the dam continues, as the result of its construction by them, defendants may be said to be maintaining it.¹

§ 328. **Subterraneous Streams.** — While an injunction will be granted to prevent a party from negligently and maliciously cutting off or diverting the supply of a neighbor's spring or well without any usefulness to himself;² yet the same liberal dominant rights pertain to ownership of land with respect to subterraneous bodies of water, as in the case of surface-waters. But an underground stream having a well-defined channel and outlet is subject to the same rules and restrictions as to use and diversion as if it flowed upon the surface.³ The burden of proving title to such streams rests upon the party asserting it.⁴

§ 329. **Title of Complainant.** — Where a water right is claimed as part and parcel of the inheritance, and relief is sought against its infringement, the same rule applies with reference to proving title and possession as in cases where equitable relief is sought against trespass and disturbance of easement.⁵ But it should be borne in mind that an interest or easement in water need not necessarily attach upon the *corpus* of land, but may be an incident of ownership, and held and enjoyed as such. Nor is it necessary that a water right be itself indeterminable except by consent of the owner to entitle him to equitable protection in its enjoyment. It may be acquired by contract as part of, or in

¹ *Troe v. Larson*, (Iowa) 51 N. W. 179.

² *Swett v. Cutts*, 50 N. H. 439, 447; s. c. 9 Am. Rep. 276; *Roath v. Driscoll*, 20 Conn. 533; *Wheatley v. Baugh*, 25 Pa. St. 528. Compare *Chatfield v. Wilson*, 28 Vt. 49.

³ *Halderman v. Bruckhart*, 45 Pa. St. 514; *Whetstone v. Bowser*, 29 Pa. St. 59; *Wheatley v. Baugh*, 25 Pa. St. 528; *Smith v. Adams*, 6 Paige, 435.

⁴ *Hanson v. McCue*, 42 Cal. 303; *Mosier v. Caldwell*, 7 Nev. 363. As to what rights a party acquires to water developed by digging a tunnel for mining purposes, see *Cole Silver Mining Co. v. Virginia, etc. Water Co.*, 1 Sawy. (U. S.) 470; *Halderman v. Bruckhart*, 45 Pa. St. 514.

⁵ *Bass v. City of Fort Wayne*, 121 Ind. 389; 23 N. E. 259.

connection with, a chattel interest in land.¹ And a court of equity will restrain the violation of a contract to furnish one a supply of water, as in case of any other contract a breach of which cannot be adequately compensated for in damages.²

§ 330. **Title by Prescription.** — Hence a prescriptive right is sufficient to entitle one to equitable protection. An easement in water acquired by prescription is as absolute as any other right, and equity will protect it from violation by injunction to prevent serious injury or vexatious litigation.³ And a prescriptive right to divert the waters of a stream for the purposes of irrigation is a good defence to an action to enjoin further diversion, however injurious such diversion has become to others, and notwithstanding they claim as riparian owners.⁴ But the prescriptive right must be based upon constant user for the full period, or in the absence of a statute on the subject, complainant must prove an uninterrupted enjoyment for twenty years, the term of twenty years having been adopted at common law, upon a principle of general convenience, as affording conclusive presumption of a grant.⁵

§ 331. **Diligence in seeking Relief.** — An equitable right to the use of water may be acquired by acquiescence of the dominant owner; and when the circumstances are such that to allow him to object to further use by complainant would operate as a fraud upon the latter, a court of equity will refuse an injunction restraining such further use. Thus, where the defendants, relying upon a verbal assurance that they would be allowed to draw

¹ The ownership of a water-ditch is not necessarily the same as the right to the water flowing through it, and is not a necessary incident thereto. *McLear v. Hapgood*, 85 Cal. 555.

² *Last Chance Water-Ditch Co. v. Heilbron*, 86 Cal. 1; 26 P. 523; *Ernst v. New Orleans W. W. Co.*, 89 La. 550; 2 So. 415. See *Alhambra Water, etc. Co. v. Mayberry*, 88 Cal. 68.

³ *Hulme v. Shreve*, 3 Green (N. J.) Ch. 116; *Wilcox v. Wheeler*, 47 N. H. 488; *Natonia Co. v. McCoy*, 23 Cal. 490; *Rupley v. Welch*, 23 Cal. 452; *Owen v. Field, etc. R. Co.*, 12 Allen (Mass.), 457; *Phoenix, etc. Co. v. Fletcher*, 23 Cal. 481; *Sheboygan v. Sheboygan, etc. R. Co.*, 21 Wis. 667. The requisites for a valid adverse title by prescription in favor of one riparian owner as against another are extensively discussed and accurately stated by Justice Fox in *Alta Land, etc. Co. v. Hancock*, 85 Cal. 219. See also *Heilbron v. Last Chance Ditch Co.*, 86 Cal. 1.

⁴ *Messinger's Appeal*, 109 Pa. 285; 4 A. 162.

⁵ *Wright v. Howard*, 1 S. & S. 203. See also *Knickerbocker Ice Co. v. Shultz*, 116 N. Y. 382; 22 N. E. 564.

water for a mill from a lake whose outlet ran through complainant's land, had erected their mill without objection from him, he was not allowed an injunction to restrain them from taking water from the lake for the use of the mill.¹ And one having knowledge that large sums of money are being invested in the improvements without objecting, may be estopped from enjoining the parties making them;² as where one acquiesces in the erection of dams and structures for mill purposes.³

§ 332. **No Estoppel without Knowledge of Adverse User.** — But there can be no estoppel without such knowledge and laches in seeking relief as justifies a presumption of assent to the adverse user. Accordingly it was held that a finding that the appropriator for five years, during the low-water season, diverted a stated quantity of water peaceably, openly, notoriously, continuously, and adversely to the riparian proprietors and their grantors, is not supported by evidence which shows that for the first two years the appropriator's ditch drew no water during the low-water period, and that for the succeeding years, by wrongfully entering on the riparian owners' land, without their knowledge, and diverting the water therefrom, the appropriator succeeded in shortening the time in which its ditch ran dry to four months in the year.⁴ And where the diversion of water from plaintiff's mining claim is sought to be enjoined, it is no objection to relief that the building of a flume, by means of which the water was diverted, was begun more than five years before suit, where the particular diversion complained of occurred within a few months of the action.⁵ The general rule

¹ *Payne v. Paddock*, Walk. (Mich.) 487. See also *Heilman v. Union Canal Co.*, 37 Pa. St. 100; *Jacob v. Clark*, Walk. (Mich.) 249; *Grusenmeyer v. Logansport*, 76 Ind. 549; *Ricketts v. Spraker*, 77 Ind. 371; *Blanchard v. Doering*, 23 Wis. 200.

² *Williams v. Jersey*, 1 Cr. & Ph. 91; *Seeley v. Bridges*, 18 Neb. 547. *Clark v. Cambridge & A. Irr. & Imp. Co.*, 64 N. W. 239; 45 Neb. 798. See also *Nosser v. Seeley*, 10 Neb. 460; *Heilman v. Union Canal Co.*, 37 Pa. St. 100; *Payne v. Paddock*, Walk. (Mich.) 487; *Water Lot Co. v. Bucks*, 5 Ga. 315; *Blanchard v. Doering*, 23 Wis. 200.

³ *Crosby v. Smith*, 19 Wis. 472; *Carley v. Gitchell*, (Mich.) 62 N. W. 1003.

⁴ *Last Chance Water-Ditch Co. v. Heilbron*, 86 Cal. 1; 26 P. 523. Where it appeared that defendants removed the obstructions for the privilege of turning other waters into the stream, and not for the right to use the natural flow of the water, it was held the holding of defendants was not adverse to that of plaintiff. *Paige v. Rocky Ford Canal & Irrigation Co.*, 83 Cal. 84; 21 P. 1102.

⁵ *Fuller v. Swan River Placer Mining Co.*, 12 Col. 12; 19 P. 836.

of equity that a party must be diligent in making objection or seeking relief so that others may not be misled by his delay, is of special importance in this connection. What constitutes proper diligence depends somewhat upon the circumstances of each case.

§ 333. **Title in Dispute.** — In these, as in other cases, courts of equity will refuse to assume jurisdiction to try and determine legal questions which are controverted.¹ And where a bill averred that the defendant illegally maintained a dam, by means of which backwater was thrown upon the complainant's mill-wheel above, and prayed an injunction against such maintenance, and the answer set up a prescriptive right to maintain the dam as it was, and denied that the dam was the cause of the interference with complainant's wheel, it was held, that the issues thus presented were not within the jurisdiction of the court of chancery.² But this rule does not have the effect of depriving a court possessing both common-law and equitable powers, of its jurisdiction to try and determine the equitable rights of the parties in an action brought and already pending before it, merely because the defendant by his answer sets up a claim adverse to plaintiff's. In such case an issue will be framed for trial in the same court before a jury.³

§ 334. **Remedy at Law.** — The remedy by injunction can only be invoked in this class of cases for the protection of parties against injuries for which an action at law would furnish no adequate relief, either because the damages are not susceptible of computation or because a recovery would furnish no security against future infringements of the right. And where the allegations or facts disclosed at the hearing show that plaintiff has an adequate remedy by action at law, the bill will be dismissed for lack of equity.⁴ And an injunction should not issue to

¹ *Roath v. Driscoll*, 20 Conn. 533; *Prentiss v. Larward*, 11 Vt. 185.

² *George W. Helme Co. v. Outcalt*, 42 N. J. 665; 9 A. 683.

³ See *Chesapeake, etc. R. R. Co. v. Bobbett*, 5 W. Va. 138; *Powers v. Bald Eagle Boom Co.*, 125 Pa. 175; 17 A. 254; 23 W. N. C. 485. That several owners of mills may maintain one bill in equity to restrain a stranger from letting on water from a reservoir which they have jointly erected for the purpose of supplying their mills in the dry season, without first establishing their title at law, see *Ballou v. Hopkinton*, 4 Gray (Mass.), 324.

⁴ *Vornholt v. Gordon*, (Ohio Com. Pl.) 30 Wkly. Law Bul. 33; 4 O. L. D. 498; *Bartlett v. Moyers*, 42 A. 204.

prevent merely nominal damages.¹ But it should not be forgotten that certain injuries to water rights, such as threatened diversion of water required for irrigation or other useful purposes, are so far presumed to be irreparable at law that it is not necessary to prove damages to entitle plaintiff to an injunction.²

§ 335. **Complications requiring Trials in Law Court.** — A case may be presented in which the facts are so complicated, the parties so numerous, and the issues so difficult of adjustment in the same action, that a legal forum is more convenient and better adapted to settle the matter in separate actions, and relief may be refused for these reasons.³

¹ *Thorne v. Sweeney*, 13 Nev. 415. See also *Kerr v. Joslin*, (Sup.) 20 N. Y. S. 929, 66 Hun, 629; *Carpenter v. Gold*, 88 Va. 551.

² *Conkling v. Pacific Imp. Co.*, 90 Cal. 230, 237; 25 P. 399. See also *Mott v. Ewing*, 90 Cal. 231; *Proprietors of Mills v. Braintree Water Supply Co.*, 149 Mass. 478; 21 N. E. 761.

³ *Bradfield v. Dewell*, 48 Mich. 9; *W. H. Howell Co. v. Charles Pope Glucose Co.*, 61 Ill. App. 593.

CHAPTER VI.

TO PREVENT TRESPASS.

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| <p>§ 336. Definitions and Distinctions.</p> <p>337. General Principles governing and Limitations upon the Jurisdiction.</p> <p>338. Essential Elements of Equitable Jurisdiction.</p> <p>339. Defence of <i>res adjudicata</i> of but Little Importance herein.</p> <p>340. Meaning of Irreparable Injury and Multiplicity of Suits.</p> <p>341. Essential Allegations.</p> <p>342. Inadequacy of Remedy at Law Real Basis of Jurisdiction.</p> <p>343. Nature of Remedy justifying Interference further considered.</p> <p>344. Substantial Injury must be shown.</p> <p>345. Rule in Federal Courts as to Multiplicity of Suits.</p> <p>346. Cutting Timber.</p> <p>347. Trespass on Burial Grounds.</p> <p>348. Destroying and Injuring Landmarks, etc.</p> <p>349. Destruction of Buildings and Fixtures.</p> <p>350. Tearing down and removing Fences.</p> <p>351. Removal of Stone — Asphaltum — Soil.</p> <p>352. Making Excavations — Constructing Tunnels, etc.</p> | <p>§ 353. Trespass upon Public Works.</p> <p>354. Trespass under Color of Condemnation Proceedings.</p> <p>355. Trespass under Pretence of Official Duty.</p> <p>356. Same — Abuse of Legal Process.</p> <p>357. Character in which Property held considered.</p> <p>358. Owner under Disability.</p> <p>359. Imminency of Danger justifying Injunction.</p> <p>360. Nature of Threatened Act decisive.</p> <p>361. Insolvency of Defendant — How far important.</p> <p>362. Requiring Bonds.</p> <p>363. Liberality in protecting Mining Property.</p> <p>364. Complainant's Title.</p> <p>365. A Possessory Title sufficient.</p> <p>366. Same — With Reference to the Character of Title.</p> <p>367. Title in Dispute.</p> <p>368. Possession in Dispute.</p> <p>369. Remedy at Law.</p> <p>370. Same — Must be adequate.</p> <p>371. Complainant required to do Equity.</p> <p>372. Relative Loss and Injury to Parties.</p> |
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§ 336. **Definitions and Distinctions.** — Trespass is essentially a wrong done to one in possession. But it does not follow necessarily that the trespasser should have no color of title, though the fact that he claims the right of possession, under color of title prior to an action being brought to settle the title, will often warrant refusal of equitable relief, as will be presently seen.¹

Trespass resembles in some respects waste and nuisance. But trespass is easily distinguishable from waste in the respect that

¹ *Infra*, §§ 364–368.

it can be committed only by a stranger to the right of possession, while waste is only imputable to one in possession; it differs from nuisance in being in itself unlawful, while a nuisance may be lawful in itself, but actionable by reason of the environment or circumstances or the manner of exercising the legal right.

§ 337. **General Principles governing and Limitations upon the Jurisdiction.** — Formerly courts of equity were extremely reluctant to interfere to prevent trespass, even in cases of repeated trespass.¹ But at the present day the jurisdiction is freely exercised in all cases where the threatened trespass if committed would be ruinous or irreparable in damages or would impair the just enjoyment of the property in the future.² As has been truly said, if courts did not interfere in such cases there would often be a great failure of justice in the country.³ Although a court

¹ Cooper, Eq. Pl. 152, 153, 154; *Norway v. Rowe*, 19 Ves. 147, 148, 149; *New York Printing and Dyeing Estab. v. Fitch*, 1 Paige, 97; *Jeremy on Eq. Jurisd.* B. 3, ch. 2, sec. 1, pp. 311, 312. The power to grant an injunction to restrain the commission of a merely personal tort, — doubted. *Kneedler v. Lane*, 3 Grant (Pa.) Cas. 523.

INJURY TO TRAFFIC. — A bill was filed to restrain a railway company from placing an obstruction partly on a public footway and partly on land belonging to the plaintiffs, a rival railway company, so as to block up the access to a station of the plaintiffs, and alleged that the injury to the traffic by allowing the obstruction to remain would be irreparable, and that the act was done without any color of title by the defendants. It was held that this was one of the exceptional cases in which this court would interfere to restrain a trespass by a stranger, and demurrer overruled. *London & N. W. Ry. Co. v. Lancashire & Y. R. R. Co.*, L. R. 4 Eq. 174. See also *Southern Pac. R. Co. v. City of Oakland*, (C. C.) 58 F. 50.

² *Peterson v. Hopewell*, (Neb.) 76 N. W. 451. The rule that only the court which rendered a judgment has jurisdiction to grant an injunction to stay proceedings thereon has no application where the execution defendant seeks an injunction to restrain an alleged trespass on property sold under the execution, though the effect of the relief sought be to defeat the proceedings on the judgment. *Humpich v. Drake*, (Ky.) 44 S. W. 632. The account given by Joyce of the adjudications whereby the English courts of chancery came to assume jurisdiction in matters of trespass, cannot but prove both instructive and interesting.

³ *Hanson v. Gardiner*, 7 Ves. 306 to 308; *Courthope v. Mapplesden*, 10 Ves. 291; *Field v. Beaumont*, 1 Swanst. 207, 208; *Crockford v. Alexander*, 15 Ves. 138; *Thomas v. Oakley*, 18 Ves. 184; *George's Creek Company v. Detmold*, 1 Md. Ch. Dec. 375. In *Thomas v. Oakley*, *supra*, Lord Eldon thus spoke of this enlargement in the jurisdiction in cases of trespass: "The distinction, long ago established, was that, if a person, still living, committed a trespass by cutting timber, or taking lead-ore, or coal, this court would not interfere, but gave the discovery; and then any action might be brought for the

of equity will not grant an injunction to restrain a trespasser, merely because he is a trespasser, yet the court will interfere where the trespass goes to the destruction of the property in the character in which such property has been held and enjoyed, or where there is a necessity of preventing a multiplicity of suits, as where the injunction is sought for the purpose of restraining persons from interfering with public worship.¹

value discovered. But the trespass dying with the person, if he died, the court said, this being property, there must be an account of the value; though the law gave no remedy. In that instance, therefore, the account was given, where an injunction was not wanted. Throughout Lord Hardwicke's time, and down to that of Lord Thurlow, the distinction between waste and trespass was acknowledged; and I have frequently alluded to the case upon which Lord Thurlow first hesitated. A person having a close demised to him, began to get coal there, but continued to work under the contiguous close, belonging to another person. And it was held, that the former, as waste, would be restrained; but as to the close which was not demised to him, it was a mere trespass, and the court did not interfere. But I take it that Lord Thurlow changed his opinion upon that; holding, that if the defendant was taking the substance of the inheritance, the liberty of bringing an action was not all the relief to which in equity he was entitled. The interference of the court is to prevent your removing that which is his estate. Upon that principle Lord Thurlow granted the injunction as to both. That has since been repeatedly followed; and whether it was trespass under the color of another's right actually existing or not. If this protection would be granted in the case of timber, coals, or lead-ore, why is it not equally to be applied to a quarry? The comparative value cannot be considered. The present established course is to sustain a bill for the purpose of injunction, connecting it with the account in both cases, and not to put the plaintiff to come here for an injunction, and to go to law for damages." See also *Livingston v. Livingston*, 6 Johns. Ch. 497 to 499, where Chancellor Kent reviewed the cases at large.

¹ *Gilbert v. Arnold*, 30 Md. 29. The remedy by injunction is allowable against a mere trespasser when the injury sought to be averted goes to the destruction of the inheritance, or is otherwise irreparable in its character. But the sole ground upon which an injunction is granted in such cases is that the trespass complained of operates such irreparable mischief that it is not susceptible of adequate compensation in the way of pecuniary damages. *Weigel v. Walsh*, 45 Mo. 560. In a note to *Shubrick v. Guerard*, 2 Desaus. (S. C.) Eq. 616, Judge Desaussure, after an able review of the cases, says: "It appears from this review of the cases, that the court has relaxed the ancient strictness of the rule, and has granted injunctions to restrain the commission of trespass in certain specified cases. These are where irreparable damage might be the consequence, if the act continues, or where the trespass has grown into a nuisance; or where the principle of the prevention of a multiplicity of suits among numerous claimants was applicable; or where the persons cutting timber got possession under articles to purchase, as in 15 Ves. 138; or where the trespasser colluded with the tenant. But that without the special circumstances which have induced the relaxation, the rule remains in force, to wit, that in case of trespass committed by a person who is a mere

§ 338. **Essential Elements of Equitable Jurisdiction.** — Three conditions have been declared as essential to relief by injunction against trespass: 1. Admission or adjudication of plaintiff's rights. 2. Admission or adjudication of defendant's wrong. 3. Inadequacy of remedy at law. In no case will an injunction lie in the absence of any special equity in the case.¹ Formerly courts of equity rigidly abstained from interfering in any case prior to an admission or establishment of complainant's title to the possession; but in later times that is seldom required. Where the injury resulting or likely to result from the trespass is irreparable in its nature, either in respect of being compensated for pecuniarily, or because from the circumstances no estimate of the damages can be made with reasonable accuracy, the inadequacy of legal remedies is sufficiently apparent, and a temporary injunction will be granted in the first instance pending an adjudication of the legal rights, though the same be in dispute.² To this extent the first essential stated above requires qualification.

stranger, or claims under an adverse title, the court will not enjoin but leave the plaintiff to his remedy at law."

¹ *Gentil v. Arnaud*, 38 How. (N. Y.) Pr. 94. See also *Thorn v. Sweeney*, 12 Nev. 256; *Hughlett v. Harris*, 1 Del. Ch. 849; *Leininger's Appeal*, 106 Pa. St. 398; *Althen v. Kelley*, 32 Minn. 280; *Livingston v. Livingston*, 6 Johns. Ch. (N. Y.) 447; *Nichols v. Jones*, 19 Fed. Rep. 857; *Switzer v. McCulloch*, 76 Va. 777; *Parker v. Winnipiseogee Co.*, 2 Black (U. S.), 545; *Piscataqua Bridge v. N. H. Bridge*, 7 N. H. 35; *Worthington v. Moon*, (N. J. Ch.) 30 A. 251; *Cœur d'Alene Consolidated & Mining Co. v. Miners' Union of Wardner*, (Cir. Ct.) 51 F. 260; *Raub Coal Co. v. Waddell*, (Pa. Com. Pl.) 7 Kulp, 282; *Hooper v. Mining Co.*, 95 Ala. 235; *Miller v. Lynch*, 149 Pa. St. 460; *Saratoga Co. v. Deyoe*, 77 N. Y. 219; *Schoonover v. Bright*, 24 W. Va. 698; *Bethune v. Wilkins*, 3 Ga. 118; *Brooks v. Diaz*, 35 Ala. 599; *Sullivan v. Hearnden*, 11 Ga. 294; *Wilson v. Hughell*, 1 Morr. (Iowa) 461; *Cowles v. Shaw*, 2 Iowa, 496; *Zugenbuhler v. Gilliam*, 3 Iowa, 391; *Amelung v. Seekamp*, 9 Gill & J. (Md.) 468; *Whitfield v. Rogers*, 26 Miss. 84; *Mayor v. Conover*, 5 Abb. (N. Y.) Pr. 171; *Thomas v. James*, 32 Ala. 723; *Crown v. Lenard*, 82 Ga. 241; *Indianapolis v. Indianapolis, etc. Co.*, 29 Ind. 245; *Stevens v. Beekman*, 1 Johns. (N. Y.) Ch. 318. A court cannot, by a preliminary *ex parte* process or order, turn a tortious holder out of possession of premises. *People v. Simonson*, 10 Mich. 335. Compare *Webb v. Harp*, 38 Ga. 641.

² *Infra*, § 360. Same principle, *Baltimore B. R. Co. v. Lee*, (Md.) 23 A. 901. So where a railroad company has built its road, in accordance with Civil Code, § 465, subd. 5, on a strip of land dedicated as a highway by the owner, it is entitled to an injunction to restrain the destruction of its track over such strip by a grantee of the land who asserts ownership thereto because it was never actually used as a highway. *Southern Pac. R. Co. v. Ferris*, (Cal.) 28 P. 828.

§ 339. **Defence of res adjudicata of but Little Importance herein.** — Injunctions of this kind are not put upon the same footing with injunctions to stay executions on judgments at law, where the legal rights of the parties have been adjudicated.¹ Accordingly, where defendants had entered upon plaintiff's land for mining purposes, and destroyed his trees, shrubbery, etc., and they threatened to continue so doing, claiming the right if they paid to plaintiff the value of the trees, as they had in fact paid one judgment recovered by him, it was held that the defendants' claim of right was unfounded, and that a perpetual injunction against their trespasses was proper to be granted.² Nevertheless, where a complainant has previously sought a legal forum for the establishment of his right and has failed to recover in an action for trespass, relief by injunction will be refused.³

§ 340. **Meaning of Irreparable Injury and Multiplicity of Suits.** — The irreparable damage here meant usually results from repeated wrongs of a continuing character resulting in damages which are not estimable by any accurate standard, and can only be conjectured. Against such wrongs as these, courts of equity rarely refuse to grant relief by injunction.⁴ Courts of equity

¹ *McBrayer v. Hardin*, 7 Ired. (N. C.) Eq. 1.

² *Daubenspeck v. Grear*, 18 Cal. 443. The construction of a tunnel, permanent in its character, through a lot is an injury irreparable in its nature, against which the owner is entitled to an injunction, without regard to the trespasser's solvency. *Richards v. Dower*, 64 Cal. 62; 28 P. 118.

³ *Bierer v. Hurst*, 29 A. 98; 162 Pa. St. 1; *Caldwell v. East Broad Top Railroad & Coal Co.*, (Pa. Sup.) 82 A. 85; 169 Pa. St. 99; 86 W. N. C. 405. See also *Hanly v. Watterson*, 89 W. Va. 214.

⁴ *Stover v. Great Western Railway Co.*, 3 Ry. Cas. 106; *Coulson v. White*, 3 Atk. 21; *North Union R. Co. v. Bolton, etc. R. Co.*, 8 Ry. Cas. 345; *Rigby v. Great Western R. Co.*, 4 Ry. Cas. 186; *Addely v. Dixon*, 1 Sim. & St. 607; *Livingston v. Livingston*, 6 Johns. Ch. (N. Y.) 501; *Boston Water Power Co. v. Boston, etc. R. Co.*, 16 Pick. (Mass.) 525; *Mooney v. Cooledge*, 80 Ark. 640; *Weigel v. Walsh*, 45 Mo. 560; *Musselman v. Marquis*, 1 Bush (Ky.), 463; *Webb v. Harp*, 38 Ga. 641; *Carney v. Hadley*, 14 So. 4; 32 Fla. 344; *Edwards v. Haeger*, 54 N. E. 176; 180 Ill. 99; *Lee v. Watson*, (Mont.) 38 P. 1077; *Ketchum v. Depew*, (Sup.) 30 N. Y. S. 794; 81 Hun, 278; *Valentine v. Schreiber*, (Sup.) 38 N. Y. S. 417; 3 App. Div. 235; *Justice v. Aikin*, 104 Ga. 714; *United States Freehold Land & Emigration Co. v. Gallegos*, 89 F. 769; 32 C. C. A. 470; *Brown v. Solary*, 37 Fla. 102; *Fulbright v. Higginbotham*, 133 Mo. 668; *Jacobson v. Van Boening*, 48 Neb. 80; *Slater v. Gunn*, 49 N. E. 1017; *Worthington v. Moon*, 53 N. J. Eq. 46; *Kellogg v. King*, 46 P. 166; 114 Cal. 378; *Kern v. Field*, (Minn.) 71 N. W. 398; *Coatsworth v. Lehigh Val. Ry. Co.*, 48 N. Y. S. 511; 24 App. Div. 273; *Ellis v. Blue Mountain Forest Ass'n*, 41 A. 856; 42 L. R. A. 570; *Hinckel v. Stevens*, 45 N. Y. S. 678; 17

do not ordinarily restrain the commission of a mere trespass; there must be some great vexation from continued trespass, or some irreparable mischief which cannot easily be measured by damages, specially alleged and clearly proven, to authorize such interference.¹

§ 341. **Essential Allegations.** — A bill which alleges that plaintiff is the owner of land covered by valuable growing timber, and that defendants are engaged in cutting and removing the same, and that if not restrained from trespassing on said land defendants will continue to cut and remove therefrom the valu-

App. Div. 279; *Barbee v. Shannon*, (Ind. Ter.) 40 S. W. 584. So an injunction will be granted where the defendant is about to sever part of a house on premises in dispute. *Echelkamp v. Schrader*, 45 Miss. 505; *Deveny v. Gallagher*, 5 C. E. Green, 33. Where permanent injury would result, especially where there is danger of oppression by powerful corporations. *Ryan v. Brown*, 18 Mich. 196; *Frederick v. Groshon*, 30 Md. 486. Where, the possession being in dispute, the defendant has, by standing by, estopped himself in equity to claim possession. *Big Mt., etc. Co.'s Appeal*, 54 Penn. St. 361. The paring down of a party wall will be enjoined, *Phillips v. Borman*, 4 Allen, 147; or the cutting off of an aqueduct, *Wilcox v. Wheeler*, 47 N. H. 488; or the diversion of water, *Wright v. Moore*, 38 Ala. 593; *Pettigrew v. Evansville*, 25 Wis. 223.

CUTTING DOWN ELECTRIC LIGHT POLES. — Plaintiff contracted to furnish the village of S. with electric lights. The village of V. lay immediately south of the village of S., a street running east and west being the dividing line. It was alleged that the trustees of V. had given plaintiff authority to erect poles. Two poles having been erected on the south side of the street in front of a church, the congregation cut them down, and made a riotous demonstration upon an attempt being made to re-erect them. *Held*, that a temporary injunction to restrain interference with the poles should be granted. *Electric Const. Co. v. Heffernan*, 12 N. Y. S. 336.

¹ *Deveney v. Gallagher*, 20 N. J. Eq. (5 C. E. Gr.) 33; *Cooper v. Hamilton*, 8 Blackf. (Ind.) 377; *Council Bluffs v. Stewart*, 51 Iowa, 385; *Thorn v. Sweeney*, 12 Nev. 251; *Sharpe v. Loane*, (N. C.) 82 S. E. 318; *Crenshaw v. Cook*, 65 Mo. App. 264. In *Jerome v. Ross*, 7 Johns. Ch. 815, Chancellor Kent, in the course of a learned opinion, said: "The objection to the injunction, in cases of private trespass, except under very special circumstances, is that it would be productive of public inconvenience, by drawing cases of ordinary trespass within the cognizance of equity, and by calling forth upon all occasions its power to punish by attachment, fine, and imprisonment, for a further commission of trespass, instead of the more gentle common-law remedy by action and the assessment of damages by a jury. In ordinary cases this latter remedy has been found amply sufficient for the protection of property; and I do not think it advisable, upon any principle of justice or policy, to introduce the chancery remedy as its substitute, except in strong and aggravated instances of trespass, which go to the destruction of the inheritance, or where the mischief is remediless." See also *Justices v. Cosby*, 5 Johns. (N. C.) Eq. 254.

able timber; that said waste has greatly injured him, and, if defendants are allowed to continue, the injury will be irreparable; but not showing in what way the damage will be irreparable, — does not show jurisdiction in equity, and will be dismissed on demurrer.¹ So where the complainant, praying an injunction against trespass by a former employee intruding into his workshop, alleged that the law afforded no adequate protection; that a continuance of the trespass would result in irreparable injury to him; that defendant was unable to respond in damages; that pecuniary compensation for the actual damages would not be adequate relief; and that restraint was necessary to prevent continuance of the intrusions, and multiplicity of suits, it was held, that neither the naked allegation of irreparable injury, nor the insolvency of the trespasser, was sufficient to warrant an injunction.² On the other hand it is not necessary that the bill should expressly allege that the injury is irreparable, provided the facts stated show such to be its nature.³

§ 342. **Inadequacy of Remedy at Law the Real Basis of Jurisdiction.** — It is apparent to one giving careful study to the subject, that the line of distinction between the two accepted grounds of relief, namely, irreparable injury and multiplicity of suits,

¹ *Watson v. Farrell*, 84 W. Va. 406; 12 S. E. 724.

² *Mechanics' Foundry v. Ryall*, 75 Cal. 601; 17 P. 703. See also *Cresap v. Kemble*, 26 W. Va. 603; *Waters v. Lewis*, 32 S. E. 854; 106 Ga. 758; *Miller v. Burket*, (Ind. Sup.) 82 N. E. 309; 132 Ind. 469; *Baltimore B. R. Co. v. Lee*, 75 Md. 596; *Grimes v. Linscott*, (Cal.) 40 P. 421; *Union Mill & Mining Co. v. Warren*, 82 F. 522. A bill alleging that a trespasser was about to commit irreparable injury by boxing and working turpentine trees, and by cutting timber and making staves on land, fit only to be cultivated for these products, without an averment of the defendant's insolvency, will be dismissed on motion. *Gause v. Perkins*, 3 Johns. (N. C.) Eq. 177.

³ *Davis v. Reed*, 14 Md. 152. In cases of application for an injunction to prevent persons from working a gold mine to which the plaintiff claims title, where it appears that, if the defendant's allegations are true, an injunction can do them no harm, but if the plaintiff's allegations are true, he may sustain an irreparable injury, the injunction should be continued to the hearing, that the facts may be investigated. *McBrayer v. Hardin*, 7 Ired. (N. C.) Eq. 1. And where a bill in equity alleged that defendant had the right to mine coal and other minerals under complainant's land; that having almost exhausted such subjacent minerals, it extended the opening of its mines into adjacent, but unconnected lands, and brought the coal therein mined to the surface of complainant's land, to be there loaded and transported; that it deposited on his land noxious refuse and foul water; and that his land was valuable for agricultural and grazing purposes, — it entitled complainant to an injunction. *Hooper v. Dora Coal Min. Co.*, (Ala.) 10 So. 652.

is often not discernible, and that the real ground of equitable jurisdiction in trespass may be most properly referred to the general head of the inadequacy of legal remedies. Where numerous acts are being committed, and their continuance threatened, by one person on the land of another, which acts constitute trespass, and the injury resulting from each act is or would be trifling in amount as compared with the expense of prosecuting actions at law to recover damages therefor, injunction will lie to restrain the trespass,¹ not alone because of the irreparable nature of the general course of wrong, nor yet for the sole reason that a multiplicity of suits or protracted and vexatious litigation would result, but for both reasons; in other words, because a law court furnishes no adequate means for complete redress, while in equity not only may the whole matter of the compensation be settled, but the present and future rights of the parties determined and adjudicated in the same proceeding.²

§ 343. **Nature of Remedy justifying Interference further considered.** — But whatever be the true reason for interfering, it is well settled that the inadequacy of the legal remedy must be shown in order to warrant relief by injunction, which is equivalent to saying that from the nature of the injury or from the fact that its continuance or frequent repetition is threatened, it is irreparable at law.³ Thus, the erection of a fence upon another's premises in such a manner and of such a character as to close the windows of the dwelling-house thereon, excluding both light and air, will be enjoined as an irreparable injury.⁴

§ 344. **Same — Substantial Injury must be shown.** — Where

¹ *Lembeck v. Nye*, 47 Oh. St. 836; 24 N. E. 686; *New York, N. H. & H. R. Co. v. Scovill*, 41 A. 246; 71 Conn. 136; 42 L. R. A. 157.

² For cases illustrative of principles underlying the jurisdiction, see *McCloskey v. Doherty*, (Ky.) 30 S. W. 649; *King v. Stuart*, 84 F. 546; *Fisher v. Carpenter*, (N. H.) 39 A. 1018; *Blondell v. Consolidated Gas Co. of Baltimore City*, (Md.) 43 A. 817; *Garvey v. Long Island R. Co.*, (N. Y.) 54 N. E. 57; 159 N. Y. 323; *McClellan v. Taylor*, 32 S. E. 527; 54 S. C. 430; *Newlin v. Prevo*, 81 Ill. App. 75; *Halpin v. McCune*, 107 Iowa, 494; *Bartlett v. Moyers*, 88 Md. 715; *Gates v. Johnston Lumber Co.*, 172 Mass. 495; *Peterson v. Hopewell*, 55 Neb. 670; *Bailey v. Gray*, 53 S. C. 503; *Crescent Min. Co. v. Mining Co.*, 17 Utah, 444; *Hall v. Nester*, (Mich.) 80 N. W. 982.

³ *Schoonover v. Bright*, 24 W. Va. 698; *Cresap v. Kemble*, 26 W. Va. 603; *Tigard v. Moffitt*, 13 Neb. 565. See also *Eno v. Christ*, 54 N. Y. S. 400; 25 Misc. Rep. 24; *Gillick v. Williams*, 53 Neb. 146; *Birmingham Traction Co. v. Birmingham Railway & Electric Co.*, (Ala.) 24 So. 502.

⁴ *Sankey v. St. Mary's Female Academy*, 8 Mont. 265; 21 P. 23.

the damages caused by acts of trespass are trivial and susceptible of ascertainment, equity will not interfere.¹ But more than an ordinary trespass and one justifying preventive relief is shown by a complaint which alleges that under a void commission a supervisor is about to open a new road cutting plaintiff's farm into irregular tracts, cutting in two his orchard, changing the frontage of his buildings, and necessitating much new fence.² The court will not, however, enjoin a municipal corporation from constructing a ditch or flume over private property, though the entry by the city was made on the Sabbath-day, and in a forcible and lawless manner, where it appears that the ditch is for a necessary public purpose, and that complainant's damages are but trifling.³ So where the evidence fails to show that the taking of ice from a mill-pond, under license from the owner of the land beneath it, results in real and substantial injury to the plaintiff in respect of a water privilege by him, derived beforehand from the same grantor, an injunction to restrain defendants from taking the ice will be refused.⁴

§ 345. **Rule in Federal Courts as to Multiplicity of Suits.** — It seems that the federal courts, in the exercise of equity powers, will not interfere by injunction to prevent the commission of

¹ *Vernam v. Palmer*, 5 N. Y. S. 71; *Sloane v. People's Electric Ry. Co.*, 7 Ohio Cir. Ct. R. 84. See also *Chicago, B. & Q. Ry. Co. v. City of Quincy*, 136 Ill. 489. Where a trifling trespass or an interference with an ancient right has been submitted to for six years, the court will not exercise its jurisdiction, but will leave the plaintiffs to their rights at law. *Gaunt v. Fynney*, L. R. 8 Ch. 8.

² *Ewin v. Fulk*, 94 Ind. 235.

³ *McCullough v. City of Denver*, 39 F. 307.

⁴ *Lathrop v. Haley*, 81 Iowa, 649; 47 N. W. 878. A decree continuing an injunction restraining railroad companies from building a track along a certain strip of land until the hearing, will not be reversed on appeal by defendants, where they have built their track, as originally intended, on another strip claimed by plaintiff, but on which the court finds defendants are not trespassers. Neither will it be reversed, on appeal by plaintiff, as to the strip not covered by the injunction, where the evidence as to plaintiff's rights as to such strip is conflicting. *Town of Durham v. Richmond & D. R. Co.*, (Ga.) 10 S. E. 208.

VIOLATION. — Defendant should not be punished for a contempt for disobeying a temporary injunction granted in a suit to restrain a trespass on plaintiff's roadway, where all evil intention is disclaimed, and the only thing done was the crossing of the railroad by some of defendant's employees in a wagon by a private roadway, the usual route being interrupted by the destruction of a bridge. *Postal Telegraph Cable Co. v. Norfolk & W. R. Co.*, (Va.) 14 S. E. 691.

trespasses upon the sole ground of preventing a multiplicity of suits between two parties. It must be there shown, not only that there are sundry persons controverting the same right, each standing on his own ground, but also that their acts work irreparable mischief.¹

§ 346. **Cutting Timber.** — The jurisdiction in trespass is often and beneficially exercised to restrain the cutting of timber and destruction of growing trees. Formerly the fact that the title to the premises was in dispute at the time of the application was considered a sufficient reason for refusing relief by injunction against the cutting and removal of timber.² But owing partly to the serious nature of the wrong, and partly to a relaxation of the rule, courts in later times usually grant temporary injunctions in this class of cases pending an adjudication of the legal right between the parties. Especially will relief be granted where the trespass of cutting timber amounts to a destruction of the essential value of the estate in the character in which it has been enjoyed.³ Where there is a dispute respecting one of the boundaries on an estate, and one of the claimants is about to cut down ornamental or timber trees in the disputed territory, he will be restrained by injunction from doing so until the disputed legal rights are settled.⁴ So where the trespass consisted in the destruction of forest trees;⁵ also in a case where the trespasser was cutting and removing from complainant's premises

¹ *Roebling v. First National Bank*, 30 F. 744. When the court of equity cannot determine the title to the land the parties will be required to frame an issue of law on that question, to be tried to a jury, pending the injunction. *Santee River Cypress Lumber Co. v. James*, (Cir. Ct.) 50 F. 360.

² *Smith v. Collyer*, 8 Ves. 89.

³ *Fulton v. Harman*, 44 Md. 251; *Ryan v. Brown*, 18 Mich. 196. See also *Kelly v. Robb*, 58 Tex. 377; *Powell v. Cheshire*, 70 Ga. 357; s. c. 48 Am. Rep. 572; *Piper v. Piper*, 38 N. J. 81. In the last case an injunction was granted against one who under an adverse claim of title was cutting down and selling timber. *United States v. Guglard*, (C. C.) 79 F. 21; *Wood v. Braxton*, (C. C.) 54 F. 1005; *Griffith v. Hilliard*, (Vt.) 25 A. 427; 64 Vt. 643; *Stetson v. Stevens*, 25 A. 429; 64 Vt. 649; *Crane v. Davis*, (Miss.) 21 So. 17; *Goettee v. Lane*, (Ga.) 25 S. E. 736. And where defendant cuts timber on lands in dispute after issuance of a restraining order, but before service thereof, he will be enjoined from removing or disposing of any of the timber still remaining within the jurisdiction of the court. *King v. Campbell*, 85 F. 814.

⁴ *Kinder v. Jones*, 17 Ves. 128. See *Shipley v. Ritler*, 7 Md. 408. See also *Crockford v. Alexander*, 15 Ves. 138.

⁵ *De La Croix v. Villere*, 11 La. An. 39; *King v. Stuart*, 84 F. 546.

growing walnut trees in a reserved lot, an injunction was granted on the ground that the injury was of a character not susceptible of adequate compensation in damages.¹ And the fact that the owner of the timber has cut some of the timber, does not constitute any defence for others for doing so;² nor does the fact that the defendant had obtained a license from the owner to cut timber from the land, where such license has been revoked prior to the application to enjoin the defendant from further cutting which he is threatening to do.³ But the irreparable nature of the injury must distinctly appear from the facts alleged;⁴ and the expression in the bill of a mere belief that the defendants had threatened and then intended to cut down and carry away "large quantities of the wood," was held insufficient to warrant the granting of an injunction.⁵

§ 847. **Trespass on Burial Grounds.** — The irreparable nature of the injury caused by entering upon burial grounds and removing therefrom the remains of bodies interred therein is generally recognized. The relief is granted in such cases upon the ground that, from the nature of the case, there can be no adequate pecuniary compensation.⁶ And where the father of the deceased, at his own expense, and by the request and with the consent of the widow, has buried his son's body in his own plat,

¹ *Thatcher v. Humble*, 67 Ind. 444. See also *Smith v. Rock*, 59 Vt. 282; 9 A. 551.

² *Musch v. Burkhart*, (Iowa) 48 N. W. 1025.

³ *Bruce v. John L. Roper Lumber Co.*, (Va.) 13 S. E. 153.

⁴ *Heaney v. Butte & Montana Commercial Co.*, (Mont.) 27 P. 379, holding that an injunction will not issue to restrain a trespasser from removing trees from a limestone mining claim, upon the owner's averments that he intends to work it, and that the trees are necessary for fuel, and that fuel is very scarce and difficult to obtain by reason of remoteness from a railroad, when the trespasser is solvent, and able to respond in damages, since such removal will not destroy or materially alter the character of the premises, but will only increase the cost of fuel.

⁵ *Cornelius v. Post*, 9 N. J. Eq. (1 Stock.) 196.

⁶ *Mooney v. Cooledge*, 30 Ark. 640. In this case the court, per Walker, J., say: "For such an injury as this there could be no standard by which to estimate the damages sustained. The extent of the injury to be inflicted must depend upon the sympathies and feelings of the parties injured, and their peculiar views as to the sacredness of the spot where the remains rest. Whilst it might be a matter of little moment to some, it might inflict an irreparable injury to others, which money could not compensate. Under the state of case presented, we hold that the suit was properly brought in a court of equity."

the widow has no right to remove it, and an injunction will issue to prevent her doing so.¹ So where land had been dedicated by a former owner for neighborhood uses as a burial ground, and had been so used for many years, a subsequent owner of the premises was enjoined at the suit of the residents of the neighborhood from disturbing the remains of their relatives and friends buried there.²

§ 348. **Destroying and altering Land-marks, etc.** — Removing and defacing land-marks and monuments which mark the boundaries of land is an injury of such serious and irreparable character as warrants equitable preventive relief.³ On the same principle an injunction lies to restrain one from entering on another's land, against the owner's consent, and setting up new land-marks, and from making out and recording the survey so made, in the register's office, with the view of carrying it into an adverse grant.⁴

§ 349. **Same — Destruction of Buildings and Fixtures.** — An injunction will usually be granted to prevent the defacement or removal of buildings or parts thereof, since such injuries are essentially injuries to the inheritance, and for that reason considered to be irreparable. Thus, where judgments were recovered against a company, and the sheriff holding the executions was about to tear down walls to remove machinery, an injunction was granted to prevent it.⁵ On the same principle an injunction will be granted against the removal of fixtures forming part of the realty. Thus, where a city has agreed, in consideration of the right of way granted, to allow the owner of land through which its water-pipes are laid the free use at all times of two hydrants, a purchaser of its system of water-works may be enjoined from digging up the pipes connecting the hydrants with the source of supply.⁶ And under similar circumstances a gas company was enjoined from disconnecting and removing gas mains connected with a larger one, the same having been laid and connected under a contract to supply gas.⁷ But where there

¹ *Peters v. Peters*, 48 N. J. Eq. 140; 10 A. 742.

² *Davidson v. Reed*, 111 Ill. 167. See also *Beatty v. Kurtz*, 2 Pet. 566; *Trustees v. Walsh*, 57 Ill. 363.

³ *Preston v. Preston*, 85 Ky. 16; 2 S. W. 501.

⁴ *Ibid.*

⁵ *Jenny v. Jackson*, 6 Ill. App. 32.

⁶ *Brown v. City of Frankfort*, (Ky.) 9 S. W. 884, 702.

⁷ *Poughkeepsie Gas Co. v. Citizens' Gas Co.*, 89 N. Y. 493.

is a dispute as to the title to the fixtures, and on the question whether or not the thing to which the alleged trespass is being or is about to be committed is or is not a fixture, and where the defendants have merely threatened to enter the building with force, or to sue out a writ of replevin to obtain possession of the same, though they are insolvent and a judgment at law against them would be worthless, an injunction should not be granted.¹

§ 350. **Same — Tearing down and removing Fences.** — Upon well-known principles an injunction will not issue to prevent defendant from tearing down a fence, when adequate damages may be recovered at law.² But where the averments sufficiently showed that such action on the part of a city would cause irreparable damage to the plaintiff, it was held that he was entitled to an injunction.³ And an injunction may issue to restrain the destruction of an Osage hedge-fence by a stranger to the inheritance.⁴ Where, however, facts other than the character of the fence itself are relied upon as a ground for relief they should be very clearly stated, so as to enable the court to judge of the character of the damage likely to result.⁵ Good cause for an injunction is stated in a petition alleging that defendants are about to open a road through plaintiff's premises, and to cut his timber, hedges, and fences, thereby exposing his crops, etc., to the depredations of stock. It is not necessary, in such petition, to aver that defendants are insolvent.⁶

§ 351. **Removal of Stone — Asphaltum — Soil.** — The unlawful quarrying and removal of stone, wherein consists the chief value of land, may be restrained by injunction.⁷ So injunction will

¹ *Hamilton v. Stewart*, 59 Ill. 330.

² *Chell v. Kemmerer*, 13 Phila. (Pa.) 502; *Minnig's Appeal*, 82 Pa. St. 373.

³ *Wilson v. City of Mineral Point*, 39 Wis. 160.

⁴ *Supp v. Roberts*, 18 Neb. 299.

⁵ *Ewing v. Rourke*, 14 Or. 514; 13 P. 483. In this case the complaint alleged that defendant broke open the fence of plaintiff's enclosure, and turned into it his horses, and allowed them to remain two months, and tore down his barn and chicken-house, and did various other wrongs, and that defendant still continued, and threatened to continue, to trespass on his premises, and to keep his stock running thereon. It was held that the plaintiff had an ample remedy at law by an action for damages, and that he was not entitled to an injunction. See also *Hoff v. Olson*, (Wis.) 76 N. W. 1121.

⁶ *McPike v. West*, 71 Mo. 199; *Stroup v. Chalcraft*, 52 Ill. App. 608.

⁷ *Althen v. Kelly*, 32 Minn. 280. See also *Thomas v. Oakley*, 18 Ves. 184; *More v. Massini*, 32 Cal. 590; *Cowper v. Baker*, 17 Ves. 128.

lie, at the suit of a purchaser of land sold by an executor, to restrain the tenant in possession from removing stone therefrom, where it appears that there is no adequate remedy at law, and that, if the writ is denied, a continuing trespass and a multiplicity of suits will result.¹ And an injunction was granted to prevent the removal of asphaltum from complainant's land, on the ground that it constituted part of the inheritance which could not be replaced or compensated for.² In another case an injunction was granted to restrain the removal of clay from complainant's lot to be used in making brick.³ But where the value of the stone or the damages for the taking of stone from a ledge on complainant's premises is computable in damages, an injunction will not be granted.⁴

§ 352. **Making Excavations — Constructing Tunnels, etc.** — Injunction is the appropriate remedy against a party who encroaches upon the land of a railroad company, and proceeds to make excavations and erect permanent buildings thereon.⁵ And an injunction will lie to prevent a railroad company from making excavations, laying tracks, and placing switches without right over land of another.⁶ The same rule applies for the prevention of a party from entering on land and digging up and removing fruit-trees growing thereon.⁷ The construction of a tunnel through land may be an irreparable injury, which, therefore, should be enjoined at the request of the owner of the land. This was illustrated in a case where an injunction was granted against laying a pipe under a railroad embankment without consent.⁸ And the solvency or insolvency of the party constructing the tunnel is immaterial.⁹ So the owner of land adjacent to land owned by another has no right to remove the earth, and thus withdraw the natural support of his neighbor's soil, and if he does, is liable for damages, and will be restrained by injunc-

¹ *Ellis v. Wren*, 84 Ky. 254; 1 S. W. 440.

² *More v. Massini*, 32 Cal. 590.

³ *Bates v. Slade*, 76 Ga. 50.

⁴ *Jerome v. Ross*, 7 Johns. (N. Y.) Ch. 315.

⁵ *Chicago, B. & Q. R. Co. v. Porter*, 72 Iowa, 426; 34 N. W. 286.

⁶ *Lake Erie & W. R. Co. v. Michener*, 117 Ind. 465; 20 N. E. 254.

⁷ *Silva v. Garcia*, 65 Cal. 591.

⁸ *Delaware, L. & W. R. Co. v. Breckenridge*, (N. J. Ch.) 41 A. 966.

⁹ *Richards v. Dower*, 64 Cal. 62. See also *Mendenhall v. Harrisburgh Water-Power Co.*, (Or.) 39 P. 399.

tion.¹ But this doctrine is strictly confined to those cases in which the owner of the land has not, by building or otherwise, increased the lateral pressure upon the adjoining soil.²

§ 353. **Trespass upon Public Works.** — In a proper case an injunction will be granted to restrain repeated interference with public works by trespassing thereon, as by placing obstructions in a canal being constructed,³ or making excavations in a street.⁴

§ 354. **Trespass under Color of Condemnation Proceedings.** — The uses of injunction to prevent the illegal taking of property before payment of its value, not having regard to the regularity of the condemnation proceedings, have been elsewhere fully treated. But where such proceedings have not in fact been instituted, and the party doing the acts is proceeding under a vague pretence of public right, without the semblance of legal authority or even a colorable compliance with law, he becomes a naked trespasser and may be enjoined as such. Thus, a person in possession of land, claiming title, is entitled to an injunction against an intruder who threatens to enter and dispossess him for the purpose of laying out a public street;⁵ and an injunction may issue to restrain municipal authorities from constructing without right a sidewalk across private land.⁶ Even where proceedings have been formally instituted, on defendant's failure to appear after due notice, an injunction pending a suit will be granted on plaintiffs' showing

¹ *Cobeille v. Meunier*, (R. I.) 41 A. 1001.

² *Farrand v. Marshall*, 19 Barb. (N. Y.) 380. *Held*, under the circumstances, that a court of equity would not grant an injunction against a party for placing earth or other materials on another's land; and that the proper remedy in such case was an action for trespass. *Mulvany v. Kennedy*, 26 Pa. St. 44.

³ *State v. Duffel*, 41 La. An. 557; 6 So. 514; Code Proc. La. art. 298, part 4. For other illustrations of injunction against trespasses on public property see *Hoag v. Pierce*, (Sup.) 20 N. Y. S. 224; 65 Hun, 424; *Palmer v. Israel*, (Mont.) 83 P. 134. But it was held that where land has been dedicated as a public park, an owner of lots which are not situated contiguous thereto, or in the vicinity thereof, and which will not be depreciated in value by the destruction of trees thereon, is not entitled to restrain such destruction merely because he and the public in general are thereby deprived of the use of such park. *Hulse v. Powell*, (Tex. Civ. App.) 51 S. W. 862.

⁴ *Rochester Saving & Loan Ass'n v. Gorman*, 47 N. Y. S. 81; 21 Misc. Rep. 394.

⁵ *Diamond Match Co. v. Village of Ontonagon*, 72 Mich. 249; 40 N. W. 448; *Yates v. Town of W. Crafton*, 88 W. Va. 507; 11 S. E. 8.

⁶ *Bryan v. East St. Louis*, 12 Ill. App. 390.

that defendant is about to forcibly dispossess them of their land under an alleged invalid condemnation proceeding; that great injury will result to plaintiffs if they are deprived of the possession pending the action to determine the validity of the condemnation; and that no injury would result to defendant if it be restrained from taking possession.¹

§ 355. **Trespass under Pretence of Official Duty.** — The same rule applies where the wrong is being or is about to be inflicted by one claiming to act in pursuance of official duty, but who in fact has no color of right either to act in the character assumed or to do the act in question. Accordingly where a road commissioner had several times removed the fences of plaintiff, claiming that they were in a public road, — which was not the fact, — and threatened to do so again, it was held that plaintiff was entitled to an injunction, there being no adequate remedy at law.² And road supervisors may be enjoined from removing or interfering with fences, hedges, or water-courses, without legal authority, though assuming to do so in the discharge of their official duties.³ So where commissioners threatened without authority from resolution or ordinance, to remove complainant's fence from land, claimed by him to have been in quiet possession of himself and his grantors for thirty years, it was held that he was entitled to an injunction against such removal.⁴ So turnpike or canal commissioners, or other similar officers, appointed under a private statute, may become trespassers, by exceeding their authority, and a court of chancery has jurisdiction to restrain them by injunction.⁵

§ 356. **Same — Abuse of Legal Process.** — Though the levying upon one's goods as those of another be not a trespass, it might

¹ *Morris v. City of New York*, 7 N. Y. S. 943; 17 Civ. Proc. R. 407.

² *Owens v. Crosett*, 105 Ill. 354.

³ *Bolton v. McShane*, 67 Iowa, 207.

⁴ *Doughty v. Sumerville Comm'rs*, 33 N. J. Eq. 1.

REMOVAL OF HOUSES BY BOARD OF HEALTH. — A court of chancery will not interfere to prevent the removal of decayed and dilapidated houses, condemned as nuisances by the board of health of a city, under an act giving them authority to remove such buildings, and other things prejudicial to health, where it does not clearly appear that the rights of the owner are illegally assailed. The court will interfere only with very great hesitancy with the prudent discharge of so necessary a duty. *Ferguson v. Selma*, 43 Ala. 398.

⁵ *Belknap v. Belknap*, 2 Johns. (N. Y.) Ch. 468.

be attended with such unusual results and serious consequences as to justify an injunction to prevent it. Such an abuse of legal process was in one case, by analogy to the exercise of jurisdiction in cases of trespass, held properly enjoined, as the damages for taking the goods would be only their value, without including any compensation for loss of trade, destruction of credit, and commercial ruin, which would have been the consequence of such levy in that case.¹

§ 357. **Character in which Property held considered.** — Sometimes, notwithstanding the fact that the damage resulting from a trespass is susceptible of computation, the uses to which it is adapted and to which it is applied may render the legal remedy inadequate to afford reparation. In a case where injunction was sought to restrain repeated trespasses upon church property the relief was granted, the court saying: "The general rule undoubtedly is, that in cases of private trespass an injunction should not be granted, for the reason that the aggrieved party has an adequate common-law remedy where proper damages could be assessed by a jury. In ordinary cases this was found to be sufficient for the protection of property. 'But in cases of a peculiar nature where the mischief was irremediable, which damages could not compensate, or where the injury reached to the very substance and value of the estate, and went to the destruction of it in the character in which it was enjoyed,' then courts of equity would grant an injunction to prevent the injury complained of. Now it must be admitted that the circumstances of this case are so special, the nature and use of the property itself are so peculiar, that an ordinary action of trespass would furnish no adequate compensation for an injury to the possession. For would any mere pecuniary damages furnish any compensation to a religious society for repeated and constant acts of trespass upon its property and temporalities? Most clearly not. The entire value of such property consists in its free and undisturbed use and enjoyment for religious worship."²

§ 358. **Owner under Disability.** — A trespass may be irreparable by action at law, not by reason of the character of the act itself, nor yet on account of the situation of the *locus in quo*,

¹ *Watson v. Southerland*, 5 Wall. 74.

² *Trustees v. Hoessli*, 13 Wis. 348, per Cole, J., citing *Beatty v. Kurtz*, 2 Peters, 566; *Jerome v. Ross*, 7 Johns. Ch. 815; *Varick v. Mayor*, 4 Johns. Ch. 53.

but because an action for redress at law is impossible, the owner being under legal disability. Thus, where property was bequeathed to the separate use of a *feme covert* without any trustee being appointed by the will, and the property was about to be sold, under an execution against the husband for his debt, it was held that the legal estate being in the husband, and, therefore, there being no one to sue for the trespass, the court would interfere to protect the property by means of a writ of injunction.¹

§ 359. **Imminency of Danger justifying Injunction.** — As to the nature of acts which will warrant a belief that an irreparable trespass is about to be committed, and the granting of preventive relief, that is properly a question of evidence foreign to our subject; and yet a few illustrations of the principles governing herein may not be out of place. It may be stated as a general rule that greater certainty of proof will be required where a bare threat to commit a trespass is the basis of an application for relief, than where the commission of the wrongful act has already been commenced, or one or more of a succession of such acts has been already committed; as where defendants had repeatedly torn down plaintiff's fence in order to pass over his lands, and had threatened to continue to do so.²

§ 360. **Nature of Threatened Act decisive.** — Where a bare threat is relied upon, the court will be influenced to a great extent by the nature of the act threatened; the right to relief depending upon whether the injury if done would be irreparable in damages at law, a clear case of impending injury and urgent necessity being required to authorize the writ.³ A threat

¹ *Smith v. Bank of Wadesborough*, 4 Johns. (N. C.) Eq. 303.

² *Shafer v. Stull*, (Neb.) 48 N. W. 882. See as to enjoining further interference with interstate commerce after end of strike, *United States v. Workmen's Amalgamated Council of New Orleans*, (C. C.) 54 F. 994. Compare *Reynolds v. Everett*, (Sup.) 22 N. Y. S. 306; 67 Hun, 294. Where the alleged trespass was committed more than a year before the application for an injunction, and there is no allegation of a threatened renewal of the trespass by the defendants, an injunction was refused. *Southard v. Morris Canal*, 1 N. J. Eq. (Sax.) 518.

³ *Duncan v. Central Passenger R. Co.*, 85 Ky. 525; 4 S. W. 228. See also *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions* Nos. 1 and 3, 90 F. 608; *Carlson v. St. Louis River Dam & Improvement Co.*, (Minn.) 75 N. W. 1044; *Bettman v. Harness*, 26 S. E. 271; 42 W. Va. 433; *Millville Traction Co. v. Goodwin*, (N. J. Ch.) 32 A. 263; *Blondell v. Consolidated Gas Co. of Baltimore City*, (Md.) 43 A. 817; *Wetherell v. Town of Newington*, 54 Conn. 67; 5 A. 858. In a suit to restrain a trespass the complaint alleged

to remove trees necessary to the proper use of a farm and for the proper shading of a contemplated house by a naked trespasser, presents such a satisfactory case of impending irreparable mischief as justifies granting the writ;¹ but a mere threat to tear down a wharf, without any overt act evincing a purpose to execute it, is not sufficient to warrant an injunction, unless the insolvency of the defendant is shown.² And an injunction should not be granted restraining a railroad company from constructing an embankment on its own land, which is necessary to make its road-bed safe, because such embankment has already slipped and is liable to further slip on plaintiff's land and ruin a spring.³

§ 361. *Insolvency of Defendant — How far important.* — The mere fact that the alleged trespasser is insolvent is not generally considered of itself sufficient to give a court of equity jurisdiction to grant an injunction if otherwise there are no obstacles to complete redress at law,⁴ though there are cases which seem to take a different view.⁵ The solvency or insolvency of a trespasser is never alone decisive, though it will be given important consideration in all cases where the court is in doubt as to the nature of the threatened injury, — whether it is susceptible of computation or is in itself irreparable.⁶ And the court will

that defendant had entered on plaintiff's land and had torn up the soil and destroyed the crops, threatening and intending to dig a ditch across it twenty feet wide and three or four feet deep; that such ditch would cut off from the main body of the tract some ten acres, which, thus separated, would have little or no value; and that such ditch would divert a large quantity of water over plaintiff's land, and interfere with its cultivation. *Held*, that the complaint made out a case of irreparable injury. *Schneider v. Brown*, 85 Cal. 205; 24 P. 715.

¹ *Powell v. Cheshire*, 70 Ga. 357; s. c. 48 Am. Rep. 572. See also *Disbrow v. Westchester Hardwood Co.*, 45 N. Y. S. 376; 17 App. Div. 610.

² *Bond v. Wool*, 107 N. C. 139; 12 S. E. 281. See also *Thornton v. Roll*, 118 Ill. 350; 8 N. E. 145.

³ *Rider v. New York, West Shore, etc. Ry. Co.*, 65 How. (N. Y.) Pr. 416.

⁴ *Morgan v. Palmer*, 48 N. H. 336.

⁵ See *West v. Smith*, 52 Cal. 322; *Duncart v. Rinehart*, 87 N. C. 224; *Derry v. Ross*, 5 Col. 295; *Webb v. Harp*, 38 Ga. 641; *Hanly v. Watterson*, (W. Va.) 19 S. E. 536; *Paige v. Akins*, 112 Cal. 401.

⁶ *McKay v. Chapin*, 26 S. E. 701; 120 N. C. 159; *Cœur d'Alene Consolidated & Mining Co. v. Miners' Union of Wardner*, (Cir. Ct.) 51 F. 260; *Gaines v. Leslie*, (Indian Ter.) 37 S. W. 947; *Kaufman v. Wiener*, 48 N. E. 479; 169 Ill. 596; *Lazzell v. Garlow*, 30 S. E. 171; *Shields v. Ditch Co.*, 23 Nev. 349; *Sisson, Brocker, & Co. v. Johnson*, (Cal.) 34 P. 617; *Amoskeag*

not stop to enter into nice calculations or to diligently seek a standard by which to measure the extent of the probable damages to result, where it is shown that if its commission be allowed to proceed plaintiff's action at law will be barren of beneficial results, owing to the defendants being pecuniarily irresponsible.¹

§ 362. **Same — Requiring Bonds.** — A very just and salutary rule has been adopted in North Carolina, where though the act be susceptible of compensation in money, and the title in dispute, yet if the defendant be insolvent he may be given the alternative of giving a bond to secure the plaintiff against repetitions of the act and for past injuries, or allowing an injunction to issue against him restraining further commissions of the act pending the final hearing.²

§ 363. **Liberality in protecting Mining Property.** — Greater latitude is allowed courts of equity where the trespass is being committed or is threatened upon mining property, than in restraining ordinary trespass to realty.³ Such jurisdiction is freely exercised upon the ground that from the nature of the case the resulting damages from such depredations may be extremely difficult of ascertainment, and with a view to preventing multi-

Mfg. Co. v. Shirley, (N. H.) 39 A. 976; *Martin v. Davis*, (Iowa) 65 N. W. 1001. Where a bill for injunction against threatened trespasses to land alleges the defendant's insolvency as the reason why the remedy at law is inadequate, evidence of defendant's solvency deprives the court of jurisdiction. *Harms v. Jacobs*, 41 N. E. 1071; 158 Ill. 505.

¹ See *Real del Monte, etc. Co. v. Pond Mining Co.*, 23 Cal. 82; *Waldron v. Marsh*, 5 Cal. 119; *Burnett v. Whitesides*, 13 Cal. 156; 2 Story's Eq. sec. 925; *Mulry v. Norton*, 100 N. Y. 424; s. c. 53 Am. Rep. 203; *Musselman v. Marquis*, 1 Bush (Ky.), 463; *Cottle v. Harold*, 72 Ga. 830; *Long v. Kasebeer*, 28 Kan. 262; *Sullivan v. Rabb*, 86 Ala. 433; 5 So. 746; *Indian River Steamboat Co. v. East Coast Transp. Co.*, (Fla.) 10 So. 480; *Echert v. Ferst*, 10 Phila. (Pa.) 514. A complainant seeking a temporary injunction against trespassers upon land, showed the defendants to be doing probably irreparable mischief, for which an injunction was the only adequate remedy; for though absolute insolvency was not charged, yet a judgment for damages was shown to be worthless; also that defendant's rights were protected by a bond, but that plaintiff, without the injunction, was at their mercy. Plaintiff showed his possession of the premises as owner. The injunction, having been once granted, was dissolved by order below. *Held*, that this order should be reversed. *Hicks v. Campton*, 18 Cal. 206.

² *Ousby v. Neal*, 99 N. C. 146; 5 S. E. 901; *Lewis v. Lumber Co.*, 99 N. C. 11; 5 S. E. 19; both timber-cutting cases.

³ *Lockwood v. Lunsford*, 56 Mo. 68; *Merced M. Co. v. Fremont*, 7 Cal. 315; *Chambers v. Alabama Iron Co.*, 67 Ala. 353.

plicity of suits.¹ The trespass is one which goes to the very substance of the inheritance; to the destruction of all that gives value to it.² And the flooding of a mine will be restrained by injunction.³ An injunction will also be granted to prevent the flowing of refuse over a mine.⁴ The digging of coal in a mine without a right presents a plain case for an injunction.⁵ And an injunction will be granted where one digging coal upon his own premises has worked through into ground of another, to prevent his proceeding further.⁶ But it will require a very strong case, to warrant an injunction against one in undisturbed possession, who has expended large sums in developing the property, to stop the work.⁷

¹ *West, etc. Co. v. Regmert*, 45 N. Y. 703; *Lewis v. Marsh*, 8 Hare, 97; *Althen v. Kelley*, 32 Minn. 280; *Scully v. Rose*, 61 Md. 408; *Anderson v. Harvey*, 10 Grat. (Va.) 386; *Bracken v. Preston*, 1 Pinney (Wis.), 584; *Merced Mining Co. v. Fremont*, 7 Cal. 315; *Beaufort v. Morris*, 6 Hare, 340; *Mitchell v. Dors*, 6 Ves. 147; *Hopkins v. Caddick*, 18 Law Times, 236; *United States v. Gear*, 3 How. (U. S.) 120; *McBrayer v. Hardin*, 7 Ired. Eq. 1; *Cœur d'Alene Consolidated & Mining Co. v. Miners' Union of Wardner*, (Cir. Ct.) 51 F. 260; *State v. Schweickardt*, 109 Mo. 496; *Greenfield Gas Co. v. Gas Co.*, 131 Ind. 599; *Allen v. Dunlap*, (Or.) 33 P. 675; *Jennings Bros. & Co. v. Beale*, 27 A. 948; 158 Pa. St. 283; *Oolagah Coal Co. v. McCaleb*, (C. C. A.) 68 F. 86.

² In *Anderson v. Harvey*, 10 Grat. 386, the court said: "The fact proved by the appellant that the value of the ore per load could be readily estimated does not deprive a court of equity of its right to interfere in the case by way of injunction. . . . The product of most mines has a value already fixed or easy of ascertainment by proof. Yet, it was in prevention to like trespasses to this very species of property, mines of ore, coal, etc., that the jurisdiction in question had its origin and still continues to be most frequently applied." See also *Moore v. Jennings*, (W. Va.) 34 S. E. 793; *Sharpe v. Loane*, 124 N. C. 1.

³ *Compton v. Lea*, 19 L. R. Eq. 115.

⁴ *Logan v. Driscoll*, 19 Cal. 623; *Thomas v. Oakley*, 18 Ves. 184; *Leininger's Appeal*, 106 Pa. St. 398; *Hammond v. Winchester*, 82 Ala. 470; 2 Story's Eq. sec. 929; *Cooper v. Baker*, 17 Ves. 128; *Jerome v. Ross*, 7 Johns. (N. Y.) Ch. 314; *Chambers v. Alabama Iron Co.*, 67 Ala. 353.

⁵ *Hansen v. Gardiner*, 7 Ves. 305; *Hart v. Albany*, 3 Paige (N. Y.), 213; *Smith v. Collyer*, 8 Ves. 90; *New York, etc. v. Fitch*, 1 Paige (N. Y.), 97.

⁶ *Mitchell v. Dors*, 6 Ves. 147. See also *Walters v. McElroy*, 25 A. 125; 151 Pa. St. 549.

⁷ *Real del Monte, etc. Co. v. Pond Mining Co.*, 23 Cal. 83; *Bruce v. Delaware, etc. Co.*, 19 Barb. (N. Y.) 371; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, (Mont.) 56 P. 120; *Hicks v. Compton*, 18 Cal. 210; 3 Daniels' Ch. Pr. 1860; *Adams*, Eq. 357. A preliminary injunction will not be issued against the drilling of an oil or gas well through a part of a coal mine from which all coal has been extracted except what is necessary for props, upon numerous affidavits by miners, engineers, and chem-

§ 364. **Complainant's Title.** — A party seeking equitable relief against one alleged to be a trespasser must allege and prove at least a possessory title in himself to the *locus in quo*. Nor is it sufficient that, on the trial, defendant fails to prove title in himself.¹ It is always an absolute bar to the allowance of an injunction for the protection of property during the litigation, that the defendant shows that the party seeking the injunction has no title or interest in the property, and no claim to the ultimate relief sought by the litigation.² And it is not sufficient that he show himself entitled to the possession; he must be actually in possession.³

He must have an interest in the property distinct from that of the public. An individual has no such property rights in public lands as will enable him to maintain a bill to restrain the pasturing of sheep thereon.⁴ Nor, since there is a recognized public right of pasturage on the public domain which is left open, can individuals be enjoined from exercising such right by persons who own parcels of land detached and scattered through a large body of the public domain, and lying open, though thereby cattle of the party complained against will trespass on com-

ists that there would be great danger of explosions in the mine from the escape of gas through leaks in the casing likely to be caused by the falling of rocks or the slipping of the earth above, and from corrosion thereof by sulphur water, when these averments are contradicted by numerous affidavits equally entitled to credit; especially so in view of the fact that special precautions are to be taken in this instance to prevent leaks, and the further fact that there is much doubt as to the respective rights of the miner and the owner of the fee. *Rend v. Venture Oil Co.*, (Cir. Ct.) 48 F. 248.

¹ *Cornett v. Combs*, (Ky.) 53 S. W. 32.

² *State v. McGlynn*, 20 Cal. 238; *Werain v. Munson*, 62 Iowa, 466; *Morse v. O'Connell*, (Wash.) 34 P. 426; 7 Wash. 117. See also *Pratt v. Railway Co.*, 50 N. J. Eq. 150; *Cushman v. Ditch Co.*, 3 Colo. App. 437; *Raleigh & W. Ry. Co. v. Mining Co.*, 112 N. C. 661; *Woodford v. Alexander*, (Fla.) 17 So. 658; *Columbus Terminal & Belt Co. v. Toledo & Ohio Cent. Ry. Co.*, (Ohio Com. Pl.) 31 Wkly. Law Bul. 186; *Paterson Ry. Co. v. Grundy*, (N. J. Ch.) 26 A. 788; *Hutton v. Metropolitan El. Ry. Co.*, (Sup.) 46 N. Y. S. 169; 19 App. Div. 243; *Hoffman v. Com'rs*, 18 Mont. 224; *Bailey v. Gray*, (S. C.) 31 S. E. 354. *McMillan v. Ferrell*, 7 W. Va. 223; *Boulo v. New Orleans, etc. R. R. Co.*, 55 Ala. 480.

³ *Hillman v. Hurley*, 82 Ky. 626; *West v. Walker*, 2 Green (N. J.) Ch. 279; *Ellsworth v. Hale*, 33 Ark. 633. See also *Powell v. Rawlings*, 38 Md. 239. An injunction will not be granted to restrain one from cutting and removing timber from land, solely because plaintiff has brought ejectment against defendant to try the title to the same land. *Cox v. Douglas*, 20 W. Va. 175.

⁴ *McGinnis v. Friedman*, (Idaho) 17 P. 635.

plainant's lands.¹ But the owner of the fee in a street may enjoin an incorporated gas company from unlawfully laying its pipes therein.² An injunction will not, however, be granted to restrain a street railroad company from laying a second track across the track of another, where it appears that the latter company has no exclusive right to occupy the street, and the answer of the former alleges that it owns the right of way over which the other's track is constructed.³

§ 365. **A Possessory Title sufficient.** — A mere *prima facie* title which is not disputed is sufficient as a basis for an injunction against a trespasser.⁴ Accordingly one who is in possession of mining ground, claiming title thereto, and who makes a *prima facie* case covering his surface locations, may sue to restrain an alleged unlawful interference with underground veins of ore within the lines of his claim.⁵ And where one owned simply the mineral interests in lands, which, without authority, were being mined by another, an injunction was held properly granted.⁶ But an injunction will not issue to restrain an interference with the possession of one who is himself a naked trespasser on land dedicated to public use.⁷ Nor has a lessee whose term expires before

¹ *Buford v. Houtz*, 133 U. S. 320; 10 S. Ct. 305. One who sowed a lettuce bed on a spot in the woods ten feet square, — *held*, not to be so possessed of the land as to enable him to maintain a bill to enjoin trespassers thereon. *King v. Malby*, 3 Lea (Tenn.), 237.

² *Sterling's Appeal*, 111 Pa. 35; 2 A. 105.

³ *Highland Ave. & B. Ry. Co. v. Birmingham Union Ry. Co.*, (Ala.) 9 So. 568.

⁴ *McArthur v. Matthewson*, 67 Ga. 184; *Dosoris Pond Co. v. Campbell*, 50 N. Y. S. 819; 25 App. Div. 179; *Bussier v. Weekey*, 4 Pa. Super. Ct. 69; *Strawberry Valley Cattle Co. v. Chipman*, (Utah) 45 P. 348. See also *Oolagah Coal Co. v. McCaleb*, 15 C. C. A. 270; *Commissioners of Highways v. Green*, 156 Ill. 504; *Bridges v. Sargent*, 1 Kan. App. 442; *Woodford v. Alexander*, 85 Fla. 333; *Springdale M. E. Church v. Shoop*, (Pa.) 30 Pittsb. Leg. J. N. S. 132.

⁵ *Gilpin v. Sierra Nevada Consolidated Min. Co.*, (Idaho) 23 P. 547; *Chapman v. Toy Long*, 4 Sawyer, 28. See also *Hext v. Gill*, L. R. 7 Ch. 699; *Aspden v. Seddon*, L. R. 10 Ch. 394. In an action for trespass upon a mining claim, praying for a perpetual injunction against defendants working the same, in which the main issue raised was the title to the land, the jury found a verdict for plaintiffs, with \$1 damages; and the court rendered judgment accordingly, but refused to grant the injunction prayed for. It was held upon appeal, that the verdict deciding the question of title in plaintiffs' favor, entitled them to the injunction prayed for. *McLaughlin v. Kelly*, 22 Cal. 211.

⁶ *Hammond v. Winchester*, 82 Ala. 470; 2 So. 892; *Webster v. Cooke*, 23 Kan. 687.

⁷ *Central Trust Co. v. Wabash, St. Louis, etc. Ry. Co.*, 25 Fed. Rep. 1;

the hearing any claim to a perpetual injunction against a third party threatening to commit a trespass upon the demised premises;¹ nor will complainant be entitled to an injunction where all he can show is a mere license to pass over the premises.²

§ 366. **Same — With Reference to the Character of Title.** — A party in possession showing an equitable title to realty will be protected by injunction against trespassers, though the location of the legal title has not been finally determined.³ And relief is not confined to those able to show a clear title of record. A title by prescription will be sufficient.⁴

The title to the public lands being vested in the general government, the United States may enjoin the digging of minerals on any part of the public domain.⁵ And a district township may maintain an action for an injunction to restrain another district township from illegally removing school-houses from its territory, and assuming control of a portion of such territory.⁶

§ 367. **Title in Dispute.** — Formerly great importance was attached to the fact that a defendant whom it was sought to restrain from committing trespass, in good faith set up a claim to the land upon which it was alleged trespasses were about to be committed; and a few courts still attach undue importance to a dispute concerning the title, apparently losing sight of the general departure from the early practice in this respect.⁷ It is true now, as it ever has been, that an injunction will not be granted where the title of the plaintiff is in dispute previous to the determination of the legal rights of the parties, unless the threatened act is of

Littlejohn v. Atrill, 94 N. Y. 619. See *Flannery v. Hightower*, (Ga.) 25 S. E. 371; 97 Ga. 592.

¹ *Boyle v. Laird*, 2 Wis. 481. If one who is injuring land refuses to produce his title papers when ordered by the chancellor, under Ga. Code, 3510, he is properly deemed a trespasser, and may be enjoined. *Mayo v. McPaul*, 71 Ga. 758.

² *Harper v. McElroy*, 42 N. J. Eq. 280; 10 A. 879. In California trespasses on land will not be enjoined when complainant has been wholly disseised, and defendant is in adverse possession. *Taylor v. Clark*, 89 F. 7.

³ *Wilson v. Rockwell*, 29 F. 674.

⁴ *Dudley v. Frankfort*, 12 B. Mon. (Ky.) 610.

⁵ *United States v. Gear*, 3 How. 121.

⁶ *Lodomillo v. Cass*, 54 Iowa, 115.

⁷ See *Shreve v. Black*, 4 N. J. Eq. (3 Green) 177; *West v. Walker*, 3 N. J. Eq. (2 Green) 279; *Irwin v. Davidson*, 3 Ired. (N. C.) Eq. 311; *Lining v. Geddes*, 1 McCord (S. C.) Ch. 304; *Powers v. Heery*, R. M. Charl. (Ga.) 523; *Nevitt v. Gillespie*, 2 Miss. (1 How.) 108; *Trustees of Paris v. Berry* 2 J. J. Marsh. (Ky.) 483.

such a nature that should the right to commit it be decided against him, the consequence of its commission would be irreparable.¹ The prevailing view and practice of the present day may be thus stated: 1. Where the bill states facts which show that a threatened trespass if not prevented will result in irreparable damage, or is in its character and tendency destructive to the inheritance, or to that which gives it its chief value, an injunction will be granted notwithstanding a dispute, or even pending litigation as to the title.² 2. Where an action has been already

¹ *Schurmeier v. St. P. etc. R. Co.*, 8 Minn. 113; *Echelkamp v. Schrader*, 45 Mo. 505; *Schoonover v. Bright*, 24 W. Va. 693; *Moore v. Ferrell*, 1 Ga. 7; *Nevitt v. Gillespie*, 2 Miss. (1 How.) 108; *Hacker v. Barton*, 84 Ill. 313; *Paris v. Berry*, 2 J. J. Marsh. (Ky.) 483; *Talbot v. Scott*, 4 Kay & J. 108; *Delaware, L. & W. R. Co. v. Breckenridge*, (N. J. Ch.) 35 A. 756; *Andries v. Detroit, G. H. & M. Ry. Co.*, (Mich.) 63 N. W. 526; *Carney v. Hadley*, 14 So. 4; 32 Fla. 344; *United States v. Southern Pac. R. Co.*, (C. C.) 55 F. 566; *Wilkinson v. Philadelphia & R. Ry. Co.*, (Com. Pl.) 13 Montg. Co. Law Rep'r, 93; *Lacustrine Fertilizer Co. v. Lake Guano & Fertilizer Co.*, 82 N. Y. 476; *Waldron v. Marsh*, 5 Cal. 119; *Perry v. Parker*, 1 Woodb. & M. 280; *Eskridge v. Eskridge*, 51 Miss. 522; *Old Tel. Co. v. Cent. etc. Co.*, 1 Utah, 331; *Verdolite Co. v. Richards*, (Pa. Com. Pl.) 7 North Co. R. 113; *Frederick v. Groshon*, 36 Md. 436; *Neal v. Cripps*, 4 Kay & J. 472; *Haigh v. Jaggard*, 2 Coll. 231; *West v. Walker*, 3 N. J. Eq. (2 Green) 279; *Irwin v. Davidson*, 8 Ired. (N. Car.) Eq. 311; *Powers v. Heery*, R. M. Charl. (Ga.) 523; *Lining v. Geddes*, 1 McCord (S. Car.), Ch. 304.

² *Spear v. Cutter*, 5 Barb. (N. Y.) 486; *Erhardt v. Boaro*, 113 U. S. 537; *Piper v. Piper*, 38 N. J. Eq. 81; *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Anderson v. Harvey*, 10 Grat. (Va.) 386; *United States v. Parrot*, McAll. (U. S.) 271; *Falls Village, etc. Co. v. Tibbetts*, 31 Conn. 165; *Peek v. Hayden*, 8 Bush (Ky.), 125; *Irwin v. Dixon*, 9 How. (U. S.) 28; *Stewart v. Chew*, 3 Bland Ch. (Md.) 440. See *Clayton v. Shoemaker*, 67 Md. 216; *McArthur v. Matthewson*, 67 Ga. 134; *Union Mut. Life Ins. Co. v. Slee*, 123 Ill. 57; 12 N. E. 543; *Comer v. Comer*, (Ga.) 18 S. E. 417; *Bishop v. Baisley*, (Or.) 41 P. 936; *Texas & P. Ry. Co. v. Interstate Transp. Co.*, 15 S. Ct. 228; 155 U. S. 585; *Kellar v. Bullington*, 101 Ala. 267; *Allen v. Dunlap*, 24 Or. 229. On motion for preliminary injunction to restrain defendant from laying its railroad track over lands to which both parties claimed title, and from digging and removing gravel therefrom, the evidence showed that the chief value of the land was the gravel beneath its surface, and that defendant's agents had expressed a determination to remove gravel from, and defendant had graded a roadway for a railroad across, the land. *Held*, that the acts of defendant would work an irreparable injury to and destroy the inheritance, and a preliminary injunction should issue until the titles are settled. *Newall v. Staffordville Gravel Co.*, (N. J.) 11 A. 495; 13 A. 270. In *Loundes v. Bettle*, 33 L. J. Ch. 451, *Kindersley, V. C.*, said: "Where, therefore, the plaintiff is in possession, and the person doing the acts complained of is an utter stranger, not claiming under color of right, the tendency of the court is not to grant an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at law, though where the acts tend to the destruction

commenced to try the title the injunction will be only temporary, to be dissolved or made perpetual according to the results of the action.¹ 3. Where no action has been already begun, an injunction will be granted and continued to give the defendant an opportunity to bring an action which, being brought and successfully prosecuted to judgment against the complainant in possession, will entitle him to a dissolution of the injunction ; but if the action at law has an opposite result the injunction will be perpetuated.² 4. The rule applies and the same course is taken where the ground upon which the relief is sought and granted is the prevention of a multiplicity of suits.³ Hence it is seen that the only influence which the existence of a dispute as to title can have upon the action of the court, in case of irreparable injury sufficiently alleged, is in the character of relief granted ; whether absolute or conditional and temporary ; and that it is of no decisive importance whatever, on the question of whether any relief whatever shall be granted. And where a party claims title to property under a recent conveyance from the defendant himself, he is not obliged to bring a suit at law against the grantor for disturbing him in his possession, in violation of the express provisions of his grant, before applying to the court of chancery for relief by injunction.⁴

§ 368. *Possession in Dispute.* — The rules stated in the preceding section only apply in cases where complainant is in the actual possession of the premises. If the title to the fee and the fact of actual possession are controverted, equity will generally refuse to interfere and leave the parties to their legal remedies ;⁵ as where of the estate, the court will grant it. But where the party in possession seeks to restrain one who claims by adverse title, there the tendency will be to grant the injunction, at least where the acts done either did or might tend to the destruction of the estate." See also *Sprenkle v. Thomas*, (Pa.) 13 York Leg. Rec. 89.

¹ *Clayton v. Shoemaker*, 67 Md. 216 ; 9 A. 635 ; *McGregor v. Silver King Min. Co.*, (Utah) 45 P. 1091 ; *Hinckel v. Stevens*, 45 N. Y. S. 678 ; 17 App. Div. 279 ; *Bettman v. Harness*, 26 S. E. 271 ; 42 W. Va. 433 ; 36 L. R. A. 566. See also *Bishop v. Baisley*, 28 Or. 119 ; *Norton v. Elwert*, 29 Or. 583 ; *Moore v. McNutt*, 41 W. Va. 695 ; *Andries v. Railway Co.*, 105 Mich. 557.

² *Cheesman v. Shreeve*, 37 F. 39. An injunction to restrain a trespass to land will not be dissolved where the answer merely questions the title of the complainant. *Moore v. Ferrell*, 1 Ga. 7 ; *Thomas v. Nantahala Marble & Talc Co.*, (C. C. A.) 58 F. 485 ; 7 C. C. A. 330.

³ *Ashurst v. McKenzie*, (Ala.) 9 So. 262 ; *McIntyre v. Storey*, 80 Ill. 127.

⁴ *Seneca Woolen Mills v. Tillman*, 2 Barb. (N. Y.) Ch. 9.

⁵ *Miller v. English*, 6 N. J. Eq. (2 Hals.) 304. In this case a part of a religious society, which owned a house of public worship and burial-ground,

both parties claimed title and right of possession of unimproved mining lands, and one of them entered thereon, sunk shafts, and began mining;¹ or where defendant repeatedly tore down a fence and drove over plaintiff's land, claiming that there was a highway by dedication and use.² In order to justify the interference by the court, the complainant must be in actual possession, or have established his right at law, or have brought an action to recover possession; or his exclusive right must be admitted by the defendant; and the court will act in the case with great precaution; it will not take jurisdiction to try title, and ordinarily will not decree that the defendant surrender possession.³ But by statute in Florida an injunction may be now granted to restrain the cutting of timber by one not in possession.⁴

§ 369. **Remedy at Law.** — After what has preceded little remains to be said as to the existence of legal remedies as a bar to relief by injunction against trespass. The general rule applies here as in other cases that a court of equity will not assume jurisdiction to pass upon purely legal matters which may be as well tried and determined in a legal tribunal. A preliminary injunction should not be granted to restrain a trespass which can be compensated in damages, even if it should appear that the defendants are irresponsible, unless there be some pressing injury or danger in the delay.⁵ And the complaint should show clearly the absence of an adequate remedy at law.⁶

built a new house in another place, and elected a board of trustees. A part continued to worship in the old building. The trustees of those who worshipped in the old house refused to permit a new party to enter and use the burying-ground; and the latter on several occasions broke open the gates for the purpose of burying therein. On bill filed, an injunction was granted restraining such forcible entry. On answer and argument, the court held that a forcible entry for such a purpose was not such an injury as called for the interposition of the court by injunction. See also *Coal Co. v. Savage*, (Com. Pl.) 4 Pa. Dist. R. 557. Compare *Miller v. Wills*, 28 S. E. 337.

¹ *Leininger's Appeal*, 106 Pa. St. 398.

² *Smith v. Gardner*, 12 Or. 221; s. c. 53 Am. Rep. 342.

³ *Bracken v. Preston*, 1 Pinn. (Wis.) 584. The court refused to dissolve an injunction of a trespass suit for the alleged wrongful taking of property, where it was adjudged that the defendant had title thereto. *Held*, no error, though the defendant had a complete defence at law. *Union Mut. Life Ins. Co. v. Slee*, 123 Ill. 57; 13 N. E. 222.

⁴ *Reddick v. Meffert*, (Fla.) 13 So. 894; 32 Fla. 409.

⁵ *Murray v. Knapp*, 62 Barb. (N. Y.) 566; 42 How. Pr. 462. See also

⁶ *Leach v. Day*, 27 Cal. 643; *Mapes v. Charles*, 55 Hun, 611; 8 N. Y. S. 665; *Bracken v. Preston*, 1 Pinn. (Wis.) 584.

TURPENTINE TREES. — The working turpentine trees being an important

§ 370. **Remedy at Law must be adequate.** — But it is a general principle that the legal remedy which warrants a refusal of relief by injunction must be plain and adequate; in other words, as practical and efficient for attaining the ends of justice and its prompt administration as that in equity. The test of equitable jurisdiction in the application of this principle to a particular case usually depends greatly upon the character of the case as disclosed in the proceedings.¹

Doughty v. Sumerville Comm'rs, 33 N. J. Eq. 1; *Minnig's Appeal*, 82 Pa. St. 373; *Poss v. Page*, 6 Ohio, 166; *Herrington v. Herrington*, 11 Ill. App. 121; *Whalen v. Dalashmutt*, 59 Md. 250; *Davidson v. Floyd*, 15 Fla. 667; *Cooper v. Hamilton*, 8 Black (U. S.), 377; *Smith v. Gardner*, 12 Or. 221; 6 P. 771; *Bolster v. Catterlin*, 10 Ind. 117; *Hodgman v. Richards*, 45 N. H. 28; *Gentil v. Arnaud*, 1 Sweeny (N. Y.), 641; *Ewing v. Ronke*, (Or.) 18 Pac. Rep. 483; *Bolton v. McShane*, 67 Iowa, 207; *Brooks v. Diaz*, 35 Ala. 599; *Catching v. Terrell*, 10 Ga. 576; *Indianapolis, etc. Co. v. Indianapolis*, 29 Ind. 245; *Cox v. Douglas*, 20 W. Va. 175; *Chesapeake, etc. Co. v. Young*, 3 Md. 480; *Old Telegraph M. Co. v. Cent. S. Co.*, 1 Utah, 331; *Perry v. Parker*, 1 Woodb. & M. (U. S.) 280; *Eskridge v. Eskridge*, 51 Miss. 522; *Schuster v. Myers*, 50 S. W. 103; 148 Mo. 422; *Erskine v. Forest Oil Co.*, (C. C.) 80 F. 588; *Wilson v. Featherstone*, 27 S. E. 121; 120 N. C. 449.

¹ *English v. Smock*, 34 Ind. 115; *Hart v. Albany*, 3 Paige (N. Y.), 213; *Burnham v. Kempton*, 44 N. H. 78; *Watson v. Sutherland*, 5 Wall. (U. S.) 74; *Hicks v. Compton*, 18 Cal. 206; *Clark v. Jeffersonville R. Co.*, 44 Ind. 261; *Sapp v.*

branch of industry in North Carolina, tending to the development of the resources of the state, the courts will not grant an injunction to restrain defendants from making turpentine, upon allegations that they are trespassers on plaintiff's land, which are fully denied; but will leave plaintiff to his remedy at law. *Bell v. Chadwick*, 71 N. C. 329. This rule was expounded by Chancellor Kent, with his usual ability, in *Stevens v. Beekman*, 1 Johns. Ch. 818, where he said: "This is a case of an ordinary trespass upon land and cutting down the timber. The plaintiff is in possession and has adequate and complete remedy at law. This is not a case of the usual application of jurisdiction by injunction; and if the precedent were once set, it would lead to a revolution in practice; for trespasses of this kind are daily and hourly occurring. I doubt exceedingly whether this extension of the ordinary jurisdiction of the court will be productive of public convenience. Such cases are generally of local cognizance, and drawing them into this court would be very expensive and otherwise inconvenient. Lord Eldon said that there was no instance of an injunction in trespass until a case before Lord Thurlow, relative to a mine, and which was a case approaching very nearly to waste, and where there was no dispute about the right. Lord Thurlow had great difficulty as to injunctions for trespass; and, though Lord Eldon thought it surprising that the jurisdiction by injunction was taken so freely in waste and not in trespass, yet he proceeded with the utmost caution and diffidence, and only allowed the writ in solitary cases of a special nature, and where irreparable damage might be the consequence if the act continued."

The existence of a statutory remedy is not alone a bar to equitable relief against the cutting and removal of timber. An injunction may issue notwithstanding a statutory remedy, where the trespass may become a nuisance, or constitute waste, or result in a multiplicity of suits, or the loss prove irreparable and not be compensable, as well as where a fiduciary relation exists.¹

§ 371. **Complainant required to do Equity.** — There applies to this class of cases another rule of general application; and that is that he who seeks extraordinary relief by injunction against another, though it be on account of a wrongful act amounting to a tort, must be willing and ready to do what is just and equitable in the premises. This principle or maxim was applied in a recent case. Plaintiff, an electric company, entered into a contract with defendant, an electrical subway company, by which plaintiff was to use defendant's subways, paying therefor a certain sum as rent. After several years' use of the subway without payment of rent, the subway company demanded the rent, and threatened to cut out and remove plaintiff's cables in default of its payment. It was held, in an action for an injunction to restrain such proceedings, waiving the question whether the court had or had not jurisdiction to grant an injunction under special laws relating to the subject-matter of the controversy, that plaintiff could not ask the intervention of a court of equity until it had paid whatever rent was due before the commencement of its proceedings.²

Roberts, 18 Neb. 299; *Silva v. Garcia*, 65 Cal. 591; *Cox v. Douglas*, 20 W. Va. 175; *Hardesty v. Laft*, 23 Md. 512; *Livingston v. Livingston*, 6 Johns. Ch. (N. Y.) 497; *De Veney v. Gallagher*, 20 N. J. Eq. 33; *Mechanics', etc. Bank v. Debolt*, 1 Ohio St. 591; *Creely v. Bay State, etc. Co.*, 103 Mass. 514; *Johnson v. Connecticut Bank*, 21 Conn. 148; *Gause v. Perkins*, 3 Jones (N. C.) Eq. 177; *Cooper v. Hamilton*, 8 Blatchf. (U. S.) 377; *Minnig's Appeal*, 92 Pa. St. 373; *Burns v. Burns*, 13 Fla. 369; *Spafford v. Bangor, etc. R. Co.*, 66 Me. 51; *Thorn v. Sweeney*, 12 Nev. 251; *Goodell v. Lessen*, 69 Ill. 145; *Lanahan v. Gahan*, 37 Md. 105; *Nicodemus v. Nicodemus*, 41 Md. 529. It is sufficient to show that the remedy at law is not as practical and efficient as that in equity; therefore, when, owing to the peculiar character of the property, the injury cannot be fully compensated in damages, an injunction will be granted. *Clark v. Jeffersonville, etc. R. R. Co.*, 44 Ind. 248.

¹ *Cowles v. Shaw*, 2 Iowa, 496.

² Affirming 15 N. Y. S. 81; *Brush Electric Illuminating Co. v. Consolidated Telegraph & Electrical Subway Co.*, 15 N. Y. S. 477. See also *Windfall Natural Gas, Mining & Oil Co. v. Terwilliger*, 53 N. E. 284; 152 Ind. 364.

§ 372. **Relative Loss and Injury to Parties.** — Though a naked trespasser is not entitled to have the resulting loss of abstinence from the course of his wrong-doing considered by the court, yet where the damage is a consequence of the use of his own property, the comparative loss and inconvenience to the parties of granting or refusing injunction will be given considerable attention. Thus, an injunction to restrain miners from working their mine so as to interfere with the ditch of another miner, was denied where it appeared that the injunction would be ruinous to the defendants and of no benefit to the plaintiff, as the destruction of the ditch was inevitable, according to the plaintiff's testimony, from the work done by the defendant.¹ And equity will refuse to enjoin where the complainant would derive no benefit from the exercise of his right.²

¹ *Clark v. Willett*, 35 Cal. 534. See also *Weigel v. Walsh*, 45 Miss. 560; *Indianapolis, etc. Co. v. Indianapolis*, 29 Ind. 245; *Colwell v. May's Landing, etc. Co.*, 4 C. E. Green, 245; *Torrey v. Camden, etc. R. R.*, 3 C. E. Green, 293; *Cross v. Morristown*, 3 C. E. Green, 305; *Laney v. Jasper*, 39 Ill. 46; *Gentil v. Arnaud*, 1 Sweeney (N. Y.), 641; *Blanchard v. Doering*, 23 Wis. 200; *Robinson v. Clapp*, 35 A. 504; 67 Conn. 538; *Becker v. Lebanon & M. Ry. Co.*, 41 A. 612; 43 W. N. C. 229; *Maffet v. Quine*, 93 F. 347; *Crescent Min. Co. v. Silver King Min. Co.*, (Utah) 54 P. 244.

² *Owen v. Field*, 12 Allen, 457; *Clark v. Willett*, 35 Cal. 534. Injunction will not be granted to restrain mere trespass, where the injury is not irreparable and destructive to the plaintiff's estate, but is susceptible of perfect pecuniary compensation, which the party may obtain in the ordinary course of law. *Anthony v. Brooks*, 5 Ga. 576; s. p. *Waldron v. Marsh*, 5 Cal. 119; *Ex p. Foster*, 11 Ark. 304; *Hatcher v. Hampton*, 7 Ga. 49; *Centervill, etc. Turnpike Co. v. Barnett*, 1 Ind. 536; *Bolster v. Catterlin*, 10 Id. 117; *Avery v. Onillon*, 10 La. An. 127; *Shipley v. Ritter*, 7 Md. 408; *Herr v. Bierbower*, 3 Md. Ch. 456; *Carlisle v. Stevenson*, Id. 499; *James v. Dixon*, 20 Mo. 79; *Scudder v. Trenton, etc. Co.*, 1 N. J. Eq. (Sax.) 694; *Hart v. Mayor*, 9 Wend. (N. Y.) 571; *Jerome v. Ross*, 7 Johns. (N. Y.) Ch. 315; *Wiggin v. Mayor*, 9 Paige (N. Y.), 16; *Marshall v. Peters*, 12 How. (N. Y.) Pr. 218; *Howell v. Howell*, 5 Ired. (N. C.) Eq. 258; *Sixth Ave. R. R. Co. v. Kerr*, 28 Id. 382; *Smith v. Pettengill*, 15 Vt. 82; *Ross v. Page*, 6 Ohio, 166. An objection that there was an adequate remedy at law, held to come too late on appeal to the supreme court. *Culver v. Rogers*, 33 Ohio St. 537.

CHAPTER VII.

AGAINST NUISANCES.

- I. GENERAL PRINCIPLES AND LIMITATIONS.
 II. ILLUSTRATIONS OF THE JURISDICTION.

I. GENERAL PRINCIPLES AND LIMITATIONS.

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§ 373. Definitions. — An excellent definition of a nuisance is
 “anything which is injurious to health, or is indecent or offen-

sive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway.”¹ The doing of certain acts by a person in the use of his premises as a dwelling-house which do not amount to a nuisance in themselves, may, when done wantonly and maliciously, for the mere purpose of annoying a neighbor and destroying the peace and quiet of his home, and which have that effect, amount to a nuisance which a court of equity will restrain.² It is not necessary that an act should be unlawful to constitute it a nuisance. One may exercise a lawful right in such a way as to entitle another to an injunction against its continuance.³ On the other hand, the mere fact that a business is unlawful does not alone constitute it a nuisance or authorize an injunction;⁴ nor can parties be enjoined as for the commission of a nuisance because they are carrying on protracted litigation thereby disturbing the public

¹ Deering's An. Civ. Code, Cal., sec. 3479. Under this provision the following acts and things have been held to be nuisances: Erecting house in highway: *Gunter v. Geary*, 1 Cal. 467; the obstruction of a highway generally: *Learned v. Castle*, 3 West Coast Rep. 154; *L. T. Co. v. S. & W. W. R. Co.*, 41 Cal. 562; *Aram v. Schallenberger*, 41 Id. 449; *Blanc v. Kumpke*, 29 Id. 156; *Brown v. Kentfield*, Id. 589; case of a boom across a navigable river: *George v. N. P. T. Co.*, 50 Id. 589; *Severy v. C. P. R. R.*, 51 Id. 194; *Schulte v. N. P. T. Co.*, 50 Id. 592; *Bigley v. Nunan*, 53 Id. 403. Diversion of watercourse a private nuisance: *Tuolumne W. Co. v. Chapman*, 8 Id. 392; *Parke v. Kilham*, 8 Id. 77; *B. R. & A. Co. v. Boles* (No. 2), 24 Id. 359. And it may be both public and private nuisance: *Yolo v. Sacramento*, 36 Id. 193. It is a nuisance to turn aside a useful element from or a destructive one on premises: *Parke v. Kilham*, 8 Id. 77. Whether wharf public nuisance a question of fact: *People v. Davidson*, 80 Id. 379. Tollgate on public way a nuisance: *El Dorado Co. v. Davidson*, 80 Id. 520.

² *Medford v. Levy*, 31 W. Va. 649; 8 S. E. Rep. 302. See *Chatfield v. Wilson*, 28 Vt. 49; *Panton v. Holland*, 17 Johns. (N. Y.) 92; *Frazier v. Brown*, 12 Ohio St. 294; *Walker v. Cronin*, 107 Mass. 564; *Mahan v. Brown*, 18 Wend. (N. Y.) 92; *Helps v. Nowlen*, 72 N. Y. 39.

³ *Infra*, § 380.

⁴ *Babcock v. New Jersey, etc. Co.*, 20 N. J. Eq. 296.

VIOLATION OF ORDINANCE. — A court of equity has no jurisdiction to restrain the threatened violation of a village ordinance unless the act threatened to be done would, if carried out, be a nuisance; and the erection of a wooden building within the limits of a city or village is not in and of itself a nuisance, nor does the fact that it is prohibited by ordinance make it such. *St. Johns v. McFarlan*, 83 Mich. 72.

peace.¹ Matters in a natural state do not constitute nuisance in law, for instance, a swamp from which malaria is exhaled causing sickness in the neighborhood. But when the party in possession does any act upon the land which increases the effect he becomes liable.²

Purpresture is usually treated as a matter distinct from nuisance, but generally amounts to a species of public nuisance. Coke defines a purpresture as an encroachment upon or the making of that several to one's self which ought to be common to many;³ as where one appropriates to his own use a public thoroughfare, such as a river, harbor, highway, or street.⁴ This definition is rather broad, and covers not only purprestures proper, but many forms of encroachment now dealt with and treated as trespass or simple nuisance. Accordingly a more restricted definition has been adopted, and the term is now applied only to cases of encroachment upon easements of a public character, such as highways, rivers, and harbors. It is not ground for refusing an injunction in such case that a statute makes such inclosure a penal offence, and provides for its prosecution and punishment, where such statute does not apply to persons inclosing land not their own, in good faith, since a public nuisance may be enjoined though indictable.⁵

§ 374. *Distinctions, how far important in this Connection.* — The distinction between a public nuisance and a purpresture for the present purpose is of but little importance. A purpresture becomes a nuisance where it becomes an annoyance to the public, and as such its further continuance will be enjoined at suit of an individual when special injury is shown, as in other cases. But a purpresture does not always constitute a nuisance. A purpresture may exist without actual injury to either private individuals or inconvenience to the public. *Prima facie*, however, the appropriation of a portion of a street or highway, river, or harbor to a party's exclusive use without legal authority is a nuisance, and places the burden of proving the contrary on the

¹ *People v. Albany, etc. R. R. Co.*, 5 Lans. (N. Y.) 25. Compare *Crane v. McCoy*, 1 Bond, 422.

² *Cooley on Torts*, 567.

³ 2 Inst. 38.

⁴ *Atty.-Gen. v. Utica Ins. Co.*, 2 Johns. (N. Y.) 371. See *New Orleans v. United States*, 10 Pet. 662; *Mohawk v. Utica*, 6 Paige, 554.

⁵ *State v. Goodnight*, 70 Tex. 682; 11 S. W. 119; *Acts Tex.* 1884, p. 69.

party claiming the right.¹ And an action by the attorney-general to abate and enjoin it is maintainable without proving annoyance or injury either to the public or individuals. Nor is the distinction between public and private nuisances important in this connection, since the same allegations are necessary and the same proofs required for the granting of an injunction against the one as against the other.

§ 375. **Same — Important only as to Party Complainant.** — The only difference in dealing with them by injunction is in a matter of practice; the only question upon which the character of a nuisance — whether public or private — is decisive, is whether a private party or the sovereign, in whatever form and name it is authorized to sue by its proper officer, should be plaintiff.² True, an individual must allege and prove special damage in order to qualify him as plaintiff, but he must also do that where he complains against a private nuisance. Indeed while a nominal distinction exists and is necessary to be retained between public and private nuisances, yet it is plain that it is one based solely upon circumstances and situation of the persons injured by it, rather than upon the nature of the grievance itself. Thus, a slaughter-house in a populous district is a nuisance *per se* of a public character; near a single habitation it is a private nuisance; and remote from habitation it is not a nuisance in any proper sense of the term. And the same thing may be within the accepted meaning of the terms, and often is, both a public and a private nuisance. Thus, a railroad on a street in the absence of legal authority is a public nuisance, and if its presence deprive an abutting lot-owner of access to his premises it is *pro hæc vice* a private nuisance.³ It may be questionable if every nuisance commonly considered public must not become, so far as complainant is concerned, a private nuisance to enable him to enjoin it. At any rate, the principles upon which relief is administered to private parties are identical, whether the nuisance be considered public or private. Therefore the whole

¹ Hart v. Albany, 9 Wend. 571.

² In Atty.-Gen. v. Sheffield Gas Co., 3 De G. M. & G. 304, 319, Lord Justice Turner said: "The only distinction which seems to him to exist between cases of public nuisance and private nuisance was this, that in cases of private nuisance the injury is to individual property, and in cases of public nuisance the injury is to the property of mankind."

³ See Yolo Co. v. Sacramento, 86 Cal. 193.

subject can be more intelligently and conveniently treated upon an arrangement of the subject according to the rules and principles by which the courts are governed, and without division with reference to the public or private character of the grievance sought to be enjoined.

§ 876. **Adaptability of the Remedy by Injunction.** — The superior adaptability of the equitable remedy by injunction to give more complete, convenient, and perfect relief than any attainable at law is universally recognized. Before a legal remedy could be given effect, irreparable mischief might ensue; besides, a resort to law would in many cases result in a multiplicity of suits and interminable litigation without reaching the end most desirable, namely, the suppression of the grievance.¹ The reasons in favor of the superiority of the equitable remedy are well summarized by Mr. Eden, as follows: "In the first place, they can interpose, where the courts of law cannot, to restrain and prevent such nuisances, which are threatened, or are in progress, as well as to abate those already existing. In the next place, by a perpetual injunction, the remedy is made complete through all future time; whereas, an information or indictment at the common law can only dispose of the present nuisance; and for future acts new prosecutions must be brought. In the next place, the remedial justice in equity may be prompt and immediate, before irreparable mischief is done, whereas at law nothing can be done except after a trial, and upon the award of judgment. In the next place, a court of equity will not only interfere upon the information of the attorney-general, but also upon the application of private parties, directly affected by the nuisance; whereas, at law, in many cases the remedy is, or may be, solely through the instrumentality of the attorney-general."²

¹ Mitf. Eq. Pl. by Jeremy, 144, 145; *Atty.-Gen. v. Johnson*, 2 Wilson, Ch. 101, 102. To prevent a great public injury resulting from the inclosure of a plank-road or other highway, a resort to chancery to enjoin, etc., is more proper and effectual than the remedy at law. *Craig v. People*, 47 Ill. 487.

² Eden on Injunct. ch. 11, p. 230; *Crowder v. Tinkler*, 19 Ves. 617, 623; *Atty.-Gen. v. Johnson*, 2 Wils. Ch. 87, 102, 103; *Corning v. Lowerre*; 6 Johns. Ch. 439; *Atty.-Gen. v. Forbes*, 2 Mylne & Craig, 129, 130. See also *Spencer v. London & Birmingham Railway Company*, 8 Sim. 193; *Sampson v. Smith*, 8 Sim. 272. In *Lyon v. McLaughlin*, 82 Vt. 423, the court say: "Where the invasion of a right of this kind of property is threatened and intended, which is necessarily to be continuing and operate prospectively and indefinitely, and the extent of the injurious consequences is contingent and doubtful of estima-

§ 377. **Grounds of Equitable Interference.** — Injunctions to restrain nuisances is one of the most ancient branches of equity jurisdiction; and in the case of public nuisances may be distinctly traced back to the reign of Queen Elizabeth.¹ In restraining a private nuisance by injunction a court of equity may act from one or more of three motives; the restraint of irreparable mischief, the suppression of oppressive and interminable litigation, or preventing a multiplicity of suits. One or more of these evils must be either present or imminent to warrant a court of equity in granting the relief; for it is not every case which furnishes a right of action against a party which will warrant a court of equity in assuming jurisdiction to redress the injury or to remove the annoyance. The injury complained of must be such as from its nature is not susceptible of being adequately compensated by damages at law, or it must be apparent that from its continuance permanent mischief or a constantly recurring grievance must result which cannot be otherwise prevented than by an injunction.² Such interference is in every case a furtherance of justice for the protection of substantial rights;³ and because numerous actions at law for the same cause would furnish no compensation.⁴

§ 378. **The same Basis of Jurisdiction over Public and Private Nuisance.** — As regards the reasons for interfering, just mentioned, the jurisdiction is exercised alike over public and private nuisances. A court of equity has jurisdiction and should grant a perpetual injunction when it is established by trial that the defendant has created a nuisance to the serious injury of the

tion, the writ of injunction is not only permissible, but is the most appropriate means of remedy. It affords in fact the only adequate and sure remedy. The very doubtfulness is to the extent of the prospective injury, and the impossibility of ascertaining the measure of just reparation renders such a remedy irreparable in the sense of the law relating to this subject."

¹ Eden on Injunct. ch. 11, pp. 224, 225.

² *Fishmonger's Company v. East Indian Company*, 1 Dick. 163, 164; *Atty.-Gen. v. Nichol*, 16 Ves. 342; *Corporation of New York v. Mapes*, 6 Johns. Ch. 46; *Mohawk & Hudson Railroad Company v. Artcher*, 6 Paige, 83; *Fisk v. Wilber*, 7 Barb. 400; *Dana v. Valentine*, 5 Met. 8, 118; *Bruce v. President, etc. of Delaware Canal Co.*, 19 Barb. 378.

³ *Wynstanley v. Lee*, 2 Swanst. 335; *Atty.-Gen. v. Nichol*, 16 Ves. 342; *Cherrington v. Abney*, 2 Vern. 646; *Earl Bathurst v. Bunoden*, 2 Bro. Ch. 64; *Nutbrown v. Thornton*, 10 Ves. 163; *Mohawk & Hudson Railroad Co. v. Artcher*, 6 Paige, 83.

⁴ *Story's Eq. Jur.* 926.

plaintiff, and that the nuisance is permanent in its character, so that the injury continues, where complete and ample remuneration cannot be awarded in damages; or where the court can see that to obtain complete and ultimate redress, at law, several suits may become necessary; or where the injury is otherwise irreparable.¹ The jurisdiction over purpresture is based upon similar grounds.²

§ 379. *Nuisance per se.* — Certain offences and occupations are usually considered to be essentially injurious to health and comfort or dangerous to life, and will be enjoined upon slight evidence of special injury, or perhaps in some cases upon no other evidence than that they exist and that persons reside in their vicinity.³ Thus a railroad or an enclosure in a street or highway constructed without legal authority is necessarily a public nuisance.⁴ Slaughter-houses have long been regarded as *prima facie* public nuisances, and, though necessary evils, must be conducted beyond the limits of populous districts. It seems to be well settled that when population encroaches upon the locality of a slaughter-house, a person moving into its vicinity may have its further use as such enjoined.⁵ But a brewery is not necessarily a nuisance, and specific performance of an agreement to grant a building lease was decreed generally, although the plaintiff had erected a brewery on the land injurious to lessor's adjoining property.⁶

¹ *Davis v. Lambertson*, 56 Barb. (N. Y.) 480; *Martin v. Douglas*, 16 W. R. 268; *Eaden v. Firth*, 1 H. & M. 573. Compare *Swaine v. Great N. Ry. Co.*, 33 L. J. (Ch.) 399.

² *Atty.-Gen. v. Johnson*, 2 Wils. Ch. 87; *Columbus v. Jaques*, 30 Ga. 506; *Silliman v. Hudson River Bridge Co.*, 4 Blatchf. (U. S.) 74; *People v. Third Ave. R. Co.*, 45 Barb. (N. Y.) 63; s.c. 30 How. (N. Y.) Pr. 121; *Atty.-Gen. v. Cohoes Co.*, 6 Paige (N. Y.), 133; *Com. v. Rush*, 14 Pa. St. 186.

³ As to what constitute nuisances *per se*, see *Quinn v. Electric Light Co.*, 140 Mass. 106; *Rogers v. Elliott*, 146 Mass. 349; *Gilford v. Hospital*, 1 N. Y. S. 448; *Shivery v. Streeper*, 24 Fla. 103; 3 So. 865, and note; *Appeal of Art Club*, (Pa.) 13 A. 537; *Burke v. Smith*, (Mich.) 37 N. W. 838; *Cook v. Anderson*, 85 Ala. 99; 4 So. Rep. 713.

⁴ *Infra*, § 421.

⁵ See *Brady v. Weeks*, 3 Barb. (N. Y.) 157; *Atty.-Gen. v. Steward*, 20 N. J. Eq. 415; *State v. Louisville, etc. R. Co.*, 86 Ind. 114; *Pruner v. Pendleton*, 75 Va. 516; *Dubois v. Budlong*, 15 Abb. (N. Y.) Pr. 445; *Howard v. Lea*, 3 Sandf. (N. Y.) 281; *Cropsey v. Murphy*, 1 Hilt. (N. Y.) 126; *Swinton v. Pedie*, 1 Macq. 74; *Bankart v. Houghton*, 27 Beav. 425; *Rex v. Cross*, 2 C. & P. 483; *Rex v. Watts*, 2 C. & P. 486; *Tipping v. St. Helen Smelting Co.*, L. R. 1 Ch. App. 66; *Rex v. Niel*, 2 C. & P. 485; *Regina v. Leech*, 6 Mod. 145; *Walter v. Selfe*, 4 Eng. L. & Eq. 20; *Rex v. Dixon*, 10 Mod. 335.

⁶ *Gorton v. Smart*, 1 S. & S. 66, 68.

§ 380. **Nuisance resulting from Manner of exercising Legal Right.** — No more difficult and delicate duty ever devolved upon a court than that of determining the relative rights between parties where one claims peculiar injury from the continuance in a line of action or course of business, and another engages in the conduct of such business enterprise not in itself unlawful or reprehensible, but still claimed to be inimical to the health, comfort, or safety of the public on account of attendant circumstances or immediate environments. In the exercise of its plenary power to enact laws for the promotion of the public well-being and to secure the safety of persons and property, the legislature may declare almost any act or line of conduct to be so far inimical to the public good as to be subject to police surveillance and suppression. It is a prime object and aim of government to prescribe the manner of so using one's property and pursuing one's occupation, as not to trespass on the property or rights of others; such power grows with the increasing complexities of our civilization, and the increasing diversities in the industries and modes of life, and the sphere, therefore, of its operations is ever widening. Every new use to which the forces of nature are applied calls for a new interference of this power, that such use may not operate to the injury of others.¹ The lawfulness of a business is not alone sufficient to give it immunity from suppression as a nuisance, when it is shown to have become obnoxious to the health, comfort, or convenience of neighboring residents, by reason of disagreeable noises, offensive odors, noxious gases, and the like.² And yet the importance of manufacturing and industrial pursuits generally and the general favor with which they are viewed would be sufficient reason for withholding relief by total suppression by injunction except in extreme cases, or to

¹ *Kansas Pac. R. Co. v. Mower*, 16 Kans. 573. In *Rhodes v. Dunbar*, 57 Pa. St. 274, an injunction was sought to restrain a party from erecting a building and carrying on a business in a particular portion of a city, on the ground that if he were allowed to continue and complete the structure and engage in the contemplated business it would prevent the building up and extension of the municipality in that direction. The court held that no ground was shown for relief, and that there could be no interference by the courts upon such ground unless the building or business was itself a nuisance.

² *Babcock v. N. J. etc. Co.*, 5 C. E. Green (N. J.), 296; *Robinson v. Baugh*, 31 Mich. 290; *Cleveland v. Citizens*, 5 C. E. Green (N. J.), 201; *Atty.-Gen. v. Steward*, 5 C. E. Green (N. J.), 405; *Imperial Co. v. Broadbent*, 7 H. L. 600; *Hutchins v. Smith*, 63 Barb. (N. Y.) 251; *White v. Coden*, 1 Drew. 313.

the extent of unnecessary evils, and it may be safely asserted that in no case where the injury complained of is not a nuisance already, but only may become so by reason of uncertain, indefinite, or contingent circumstances, will equity interfere.¹

§ 381. **Same Subject.** — The distinction between nuisances *per se* and those which result from acts and things not unavoidably or in themselves obnoxious, but only so according to circumstances to be established in evidence, becomes of special importance in this connection. In the latter instances courts will frequently refuse to interfere until the true character of the alleged grievance has been tried and determined at law.² The jurisdiction by injunction, where the effect will be to stop a great trading concern, is exercised with caution, and not *ex parte* but on notice.³ And where the use of a dwelling-house for residence purposes in a certain way interferes with the profitable use of adjoining property devoted to trade or manufacturing, such detrimental use of the former will be restrained. Thus, where defendants, keeping a hotel in London, put up a stove, the heat of which rendered the cellar of an adjoining house unfit for storing wine, it was held that, although defendants were acting reasonably in the use of their house, yet, as they caused serious

¹ Laughlin v. Lamasco, 6 Ind. 223; Duncan v. Hayes, 7 C. E. Green (N. J.), 25; Earl of Ripon v. Hobart, 3 Myl. & K. 169; Lake View v. Letz, 44 Ill. 81; Kirkman v. Handy, 11 Humph. (Tenn.) 406; Dunnig v. Aurora, 40 Ill. 481; Mohawk Co. v. Utica, etc. R. Co., 6 Paige (N. Y.), 554; Given v. Melmoth, Freem. (Miss.) Ch. 505; Rhodes v. Dunbar, 57 Pa. St. 274; Thebant v. Canova, 11 Fla. 143; Simpson v. Justice, 8 Ired. (N. Car.) Eq. 115.

² Ogletree v. McQuaggs, 67 Ala. 584; Dorsey v. Allen, 85 N. C. 358; s. c. 39 Am. Rep. 704; Demarest v. Hardham, 34 N. J. Eq. 469; Kingsbury v. Flowers, 65 Ala. 484; St. James v. Arrington, 36 Ala. 548; Rosser v. Randolph, 7 Port. (Ala.) 245; Green v. Lake, 54 Miss. 540; s. c. Am. Rep. 378; Ruge v. Apalachicola Oyster Canning & Fish Co., (Fla.) 6 So. 489; Ray v. Lynes, 10 Ala. 64; Van Bergen v. Van Bergen, 3 Johns. Ch. (N. Y.) 287; Davidson v. Isham, 1 Stock. (N. J.) 186; Porter v. Whitham, 17 Me. 292; White v. Forbes, Walk. (Mich.) 112; Mammoth, etc. Co.'s Appeal, 54 Pa. St. 183; Arnold v. Klepper, 24 Mo. 273; Rochester v. Curtiss, 1 Clarke (N. Y.) Ch. 336; McCord v. Iker, 12 Ohio, 387; Pennsylvania R. Co. v. New York, etc. R. Co., 8 C. E. Green (N. J.), 157; Sprague v. Rhodes, 4 R. I. 301.

³ Atty.-Gen. v. Cleaver, 18 Ves. 217. Although a very strong case of nuisance (in this case smell, etc., from petroleum works) may be established by the affidavits in support of an interlocutory motion to restrain the noxious manufactory, the court said it considers it a very strong course to stop the carrying on a trade by interlocutory injunction, and reserved the question until the hearing of the cause, which was advanced for that purpose. Atty.-Gen. v. Charles, 11 W. R. 253.

annoyance and injury to plaintiff, the court would interfere to protect the plaintiff; the jurisdiction of the court not depending on the question of reasonable use.¹

§ 382. **Suit by Attorney-General.** — An action will not lie by an individual or corporation to restrain, by injunction, the commission of an act on the ground that it is a public nuisance, or the usurpation of a franchise detrimental to all the people of the state, such as the filling up of a highway or navigable river, unless peculiar individual injury be shown. The remedy must be applied for in the name of the people and by the public officers appointed for the purpose.² On the other hand it is a good defence to an action brought by the attorney-general, though on the relation of a private party, to show that the public has no interest in the *locus in quo*, and that injury is not to the public at large, but only to a few individuals.³

§ 383. **Suit by Private Party.** — Where private individuals suffer an injury distinct from that suffered in common with the general public in consequence of a public nuisance, they are entitled to relief by injunction, which will thus compel the wrongdoer to take active measures against allowing the injury to continue.⁴ But to enable an individual to maintain

¹ Reinhardt v. Mentasti, 42 Ch. Div. 685.

² Sparhawk v. Union Passenger R. Co., 54 Pa. St. 401; Manhattan, etc. Co. v. Baker, 7 Robt. (N. Y.) 523. See also cases cited in next section. Where a judgment was found that the extension of a railroad is a public nuisance, that alone, on a trial, entitles the plaintiffs to relief by injunction, although no damage is shown. And if the necessity of the extension is not established, and the extension is unlawful, it is then the attempted exercise by the company of a valuable franchise not authorized by law. This, independently of any other considerations or proof, is a sufficient damage to uphold a decree for a perpetual injunction. People v. Third Avenue R. R. Co., 45 Barb. (N. Y.) 63.

³ In Morris, etc. R. R. Co. v. Prudden, 20 N. J. Eq. (5 C. E. Gr.) 530, an information against a railroad company was filed in the name of the attorney-general, on the relation of owners of lots fronting upon a street which was occupied by the defendants' road track, and through which they were about to lay a second track, authorized by their charter. It appeared that the public right in the street had been extinguished by the vacation of it as a public highway, except for a distance of three hundred feet. There being no allegation that the public travel over that fragment of the highway was impeded, it was held that the court would not interfere by injunction at the instance of the attorney-general.

⁴ Spencer v. London & Birmingham Railway Company, 8 Sim. 193; Catlin v. Valentine, 9 Paige, 575. See Sampson v. Smith, 8 Sim. 272; Soltan v. De Held, 9 Eng. Law and Eq. 104; Smith v. Lockwood, 13 Barb. 209; Lamborn

such action he must allege and prove special and substantial damages.¹

The owner of a slaughter-house, who slaughters a large number of animals daily, and has no other place for slaughtering, is

v. The Covington Company, 2 Md. Ch. Dec. 409; *Baltimore, etc. Railroad Co. v. Strauss*, 37 Md. 237. The rule that where the nuisance is public the plaintiff to obtain an injunction must allege and prove special damage to himself, independent of that which he suffers in common with the community at large, is sustained by the following additional authorities: *Shed v. Hawthorne*, 3 Neb. 179; *Hinchman v. Patterson, etc. R. Co.*, 2 C. E. Green (N. J.), 75; *Perkins v. Moorestown & C. Turnpike Co.*, (N. J.) 22 A. 180; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; *Passenger R. Co. v. Philadelphia*, 2 W. N. C. (Pa.) 639; *Sparhawk v. Union Passenger R. Co.*, 54 Pa. St. 401; *Frink v. Lawrence*, 20 Conn. 117; *Corning v. Lowerre*, 6 Johns. (N. Y.) Ch. 439; *Doolittle v. Broome Co.*, 18 N. Y. 160; *O'Brien v. Norwich, etc. R. Co.*, 17 Conn. 372; *Allen v. Board*, 2 Beas. (N. J.) 68; *Beveridge v. Lacey*, 3 Rand. (Va.) 63; *Walker v. Shepherdson*, 2 Wis. 384; *Barnes v. Racine*, 4 Wis. 454; *Ewell v. Greenwood*, 26 Iowa, 377; *Williams v. Smith*, 22 Wis. 540; *Engs v. Peckham*, 11 R. I. 210; *Coast Line R. Co. v. Cohen*, 50 Ga. 451; *Columbus v. Jaques*, 30 Ga. 506; *Prince v. McCoy*, 40 Iowa, 533; *Illinois Co. v. St. Louis*, 2 Dill. (U. S.) 70; *Higbee v. Camden, etc. L. Co.*, 4 C. E. Green, (N. J.), 276. *Contra*, *Whitfield v. Rogers*, 26 Miss. 84.

¹ *Sparhawk v. Union Pas. R. R. Co.*, 54 Penn. St. 401; *Black v. Phila., etc. R. R. Co.*, 58 Penn. St. 249; *Higbee v. Camden, etc. R. R.*, 4 C. E. Green, 276; *Hartshorn v. South Reading*, 3 Allen, 501; *Manhattan, etc. Co. v. Barker*, 7 Robt. 523; *Osborne v. Brooklyn, etc. R. R. Co.*, 5 Blatch. C. C. R. 366; *Sheboygan v. Sheboygan, etc. R. R. Co.*, 21 Wis. 667. The damages were held not of such a special nature as to warrant an injunction against public nuisances in the following cases: *Fineux v. Hovenden*, Cro. Eliz. 664; *Clark v. Saybrook*, 21 Conn. 314; *Electric Const. Co. v. Heffernan*, 12 N. Y. S. 336; *Paine v. Patrick*, Carth. 194; s. c. 3 Mod. 289; *Mechling v. Kitanning Bridge Co.*, 1 Grant (Can.), 416; *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316; *McCowan v. Whitesides*, 31 Ind. 235; *Hartshorn v. South Reading*, 3 Allen (Mass.), 501; *Johnson v. Stayton*, 5 Harr. (Del.) 362; *Brainard v. Connecticut River R. Co.*, 7 Cush. (Mass.) 511; *Carpenter v. Mann*, 17 Wis. 155; *Houck v. Wachter*, 34 Md. 265. But a complaint which charges an injury to the use and enjoyment of plaintiff's dwelling, and the depreciation in value consequent upon the dust, smoke, and offensive odors resulting from the operation of a steam-engine by defendant company in pulling logs, shows an injury distinct from that of the general public, entitling the plaintiff to relief by injunction. *Adams v. Ohio Falls Car Co.*, (Ind. Sup.) 31 N. E. 57. The rule that equity will not interfere to restrain a public nuisance, except in a plain case, applied where an injunction was prayed against the erection of a "stone-row" across what was alleged to be a public road; the evidence being conflicting as to whether the road had been opened by the supervisor. *Bunnell's Appeal*, 69 Pa. St. 59. A denial of an injunction against maintaining fires and dangerous machinery in a city, made on the ground that the municipal authority might be called upon to abate the nuisance, — sustained (Jackson, J., dissenting on the ground that the danger was imminent, and that the legal remedy involved delay). *Powell v. Foster*, 59 Ga. 790.

specially injured by an obstruction in the highway which wholly cuts him off from access to the slaughter-house, and may enjoin the nuisance by a suit in his own name, under a statute providing "that a private person may maintain an action for a public nuisance if it is specially injurious to himself, but not otherwise."¹ Indeed it is a general principle that if the right of way over a street, of the owner of a lot fronting thereon, is so unlawfully obstructed as to subject him to a special injury not common to, but distinct and different from that suffered by the public, and for which he cannot obtain adequate compensation at law, he is entitled to summary interference of a court of equity by injunction.² But it was held that the designation of piers as dumping ground for the use of the street-cleaning department of New York city being necessary for the preservation of the health of the citizens, such use would not be enjoined as a nuisance on the ground that one individual was inconvenienced thereby, unless it appeared that such individual would suffer irreparable as well as special injury;³ and one who is a non-resident of the town or city has no such interest as entitles him to interfere, though he is heir to the donor of land used as a burying-ground whereon the alleged nuisance is being committed.⁴

The same rule applies in cases of purpresture with respect to applications for injunctions by private individuals as in the case of public nuisances. They must show special injury aside from that suffered by the community at large.⁵

§ 384. **Motive for suing usually Immaterial.**—It is no bar to an injunction restraining the construction of side-tracks in streets, that plaintiff may have acquired his title to adjacent property from collateral motives, and very recently before the work complained of began.⁶ And where the grievance complained

¹ *Gardner v. Stroever*, 89 Cal. 26; 26 P. 618; Civ. Code Cal. § 8493.

² *Baltimore, etc. R. R. Co. v. Strauss*, 37 Md. 237.

³ *Hill v. City of New York*, 15 N. Y. S. 393.

⁴ *Pott v. School Directors*, 42 Pa. St. 132.

⁵ *Harrison v. Newton*, 9 N. Y. Leg. Obs. 347; s. c. 1 Code R. N. S. (N. Y.) 207; *Shed v. Hawthorne*, 3 Neb. 179; *Hinchman v. Patterson, etc. R. Co.*, 17 N. J. Eq. 75.

⁶ *Savannah & W. R. Co. v. Woodruff*, 86 Ga. 94; 13 S. E. 156. In a suit by a riparian owner to enjoin the pollution of a stream, the facts that part of the stream is in a measure polluted by others besides defendant; that plaintiff's lands are comparatively valueless; that he bought them after the nuisance was established; that his motive in so doing was bad; and that

of was the laying of water-pipes in the soil of the highway, the fee of which was in complainant, it was held to be immaterial that the soil under the highway was of no value to the owner, and that his motive for applying to the court was not connected with the enjoyment of his land, and was no reason against granting the injunction.¹ But although the motives with which a suit is instituted are not generally to be regarded, they are not wholly immaterial when the complaint is of an alleged public injury; and the views of the majority of the inhabitants of a town, and of their governing body, are not without weight on such questions.²

§ 885. **Nature of Injury justifying Interference.** — An injunction will not be granted for every offensive act which is only contingent and temporary; but if it be continued so long as to become a permanent source of annoyance, and a constantly recurring injury and evil so as to fall within the full meaning of a nuisance, an injunction ought to be granted to restrain the party responsible for it from its further maintenance.³ A doubtful or contingent injury or act which will lessen the value of property in the vicinity, or increase the rate of insurance, but will cause no irreparable injury, cannot be regarded as proper ground for an injunction.⁴ A court of equity cannot enjoin a business which is in itself lawful and carried on reasonably, so as not to affect the health or comfort of the neighborhood, or

the injury to the business of defendants by an injunction will be very great, — are not material. Having a right to buy the land, he took all the vendor's rights in the stream, and is entitled to enforce them. *Townsend v. Bell*, (Sup.) 17 N. Y. S. 210.

¹ *Goodson v. Richardson*, L. R. 9 Ch. 221.

² *Atty.-Gen. v. Sheffield, etc. Co.*, 3 De G. M. & G. 304.

³ *Coulson v. White*, 3 Atk. 21; *Cotton v. Mississippi, etc.*, 19 Minn. 497; *Gaunt v. Fynney*, L. R. 8 Ch. App. 8. *Hill v. Schueider*, 43 N. Y. S. 1; 13 App. Div. 299; 4 N. Y. Ann. Cas. 70. A bill and information filed by and at the relation of a millowner, to restrain the local board of health of a town from discharging sewage into a river, was dismissed with costs, on the ground that the injury proved was trifling. *Atty.-Gen. v. Gee*, L. R. 10 Eq. 131. A pipe was laid also along and underneath the surface of a street and upon lands of a railroad company which had been condemned for the purposes of the street. The pipe crossed the railroad tracks. An injunction was applied for. *Held*, that it should be refused. *Central R. R. Co. v. Standard Oil Co.*, 33 N. J. Eq. 127.

⁴ But an injunction was granted against a brothel alleged to inflict special damage in the value and use of adjoining property. *Hamilton v. Whitridge*, 11 Md. 128.

preclude the ordinary uses and enjoyments of property. A nuisance against which a court of equity will grant an injunction must be a material injury to property, or inimical to the comfort or the existence of those who dwell in the neighborhood;¹ yet where the nuisance causes substantial and permanent damage to an individual, the court will not refuse an injunction, even though the act causing the nuisance may in its results be beneficial to the public.²

§ 386. **Same — With respect to Computability of Damages.** — In cases involving nuisances the irreparable injury which will warrant an injunction is not necessarily such as is beyond the possibility of reparation or compensation in damages, but an injunction will be granted to restrain any species of injury by which a right of the complainant has been unlawfully violated, and

¹ *Luscombe v. Steer*, 17 L. T. n. s. 229; *Clifton Iron Co. v. Dye*, 87 Ala. 468; 6 So. 192. A contrary view appears to be taken by the California supreme court, in *Learned v. Castle*, 78 Cal. 454; 21 P. 11, where it was held that where the object of an action is to declare a nuisance, and prevent its continuance by mandatory injunction, the amount of damage is immaterial. It is no answer to a complainant by a manufacturer of a nuisance to his trade, to say that the injury is felt only by reason of the delicate nature of the manufacture. But the circumstances that the injury done is accidental and occasional only, that careful precautions are taken, and that there is no exceptional risk, such as arises from the storage of gunpowder or highly inflammable materials, are ground for refusing an injunction, and leaving the plaintiff to his remedy by action. *Cooks v. Forbes*, L. R. 5 Eq. 166. The sale of adulterated teas will not be restrained by injunction unless it appears to threaten serious danger to human life or serious detriment to health. *New York Health Department v. Purdon*, 99 N. Y. Super. 287; 51 N. Y. Super. Ct. 109; s. c. 52 Am. Rep. 22.

² *Broadbent v. Imperial Gas Co.*, 3 Jur. n. s. 221; 26 L. J. (Ch.) 276; *Sherlock v. Kansas City Belt Ry. Co.*, 43 S. W. 629; 142 Mo. 172. In *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565, Storrs, J., says: "Of whatever character it is requisite that the injury complained of should be, in order to lay the foundation for this remedy, it is necessary that it should be a substantial and not merely a technical or inconsequential injury. There must not only be a violation of the plaintiff's rights, but such a violation as is or will be attended with actual or serious damage. Even although the injury may be such that an action at law would lie for damages, it does not follow that a court of equity would deem it proper to interpose by the summary, peculiar, and extraordinary remedy of injunction. (*Spencer v. London & Birmingham Railway Company*, 8 Simons, 193.) It is obviously not fit that the power of that court should be invoked, in this form, for every theoretical or speculative violation of one's rights. Such an exercise of it would not only be wide from the object of investing those courts with that power, but would render them engines of oppression and vexation, and bring them into merited odium."

such violation is, or is likely to be, continuous.¹ Where the wrong constituting the nuisance is already committed and the danger past, the only remedy of the party is at law. But if there is imminent danger of its repetition, or if it be continuous in its nature, equity will interfere to enjoin it.²

§ 387. **Same — Future Injury ; Example to Others.** — Upon the well-established principle that an existing evil irreparable at law must be shown, an allegation that a structure may in the future become an annoyance or obstruction is not sufficient to sustain a bill. And a city cannot maintain a bill to enjoin the erection of a permanent building on a wharf projecting into a navigable river, upon the ground that at some future time the city may condemn the premises for a bridge.³ For the same reason an injunction will not be granted merely because the maintenance of an obstruction or other grievance if allowed will establish an example to be followed by others. And a petition in a suit by a city for an injunction to restrain defendant from driving piles into the bed of a river, and erecting a building thereon, states no cause of action where it merely alleges that the effect of defendant's "example" in erecting such building will be that others will do likewise, to the injury of complainant in respect of the public health, equal taxation, and liability to fire and flood.⁴

§ 388. **What properly considered in determining whether Injury special.** — Though a party may be injured in some respects by the structure or improvement complained of, yet if in other respects he is greatly benefited, the benefits enjoyed may be considered by the court in determining whether upon the whole the injury is of such a character as to entitle him to an injunction. Thus, where an action is brought to enjoin the maintenance and operation of an elevated railway, to warrant the injunction the complaint must show a substantial injury; and, as the question

¹ *Wood v. Sutcliffe*, 2 Sim. N. S. 165; *Corning v. Troy, etc. Co.*, 40 N. Y. 191; *Elmhurst v. Spencer*, 2 Mc. & G. 50; *Atty.-Gen. v. Tel. Co.*, 30 Beav. 287. See also *Cleveland v. Citizens, etc. Co.*, 20 N. J. Eq. 201; *Wood, Nuisance*, Sec. 789; *Rhodes v. Dunbar*, 57 Pa. St. 274; *Shimer v. Morris Canal & Banking Co.*, 27 N. J. Eq. 364.

² *Peck v. Elder*, 3 Sandf. (N. Y.) 126; *Lexington, etc. Bank v. Gwynn*, 6 Bush (Ky.), 486; *Atty.-Gen. v. N. J. R. Co.*, 2 Green (N. J.) Ch. 136; *Wangelin v. Goe*, 50 Ill. 459.

³ *City of Chicago v. Reed*, 27 Ill. App. 482.

⁴ *City of Janesville v. Carpenter*, 77 Wis. 288; 46 N. W. 128.

in such a case is one of permanent injury to the inheritance, it is proper to consider the advantages of the locality of complainant's lots for residential purposes, the effect of the railway structure in neutralizing those advantages, and the comparative value of the lots for any other purpose.¹ And the fact that property in adjacent streets not affected by the railroad has doubled in value since its construction, while the value of complainant's property has only slightly increased, proves that the injury from the railroad preponderates over the benefits derived from it, and warrants the issuance of an injunction against its continued operation.²

§ 389. **Value of Complainant's Property Interest immaterial.** — While, as has been stated,³ the plaintiff must show a present and material injury in order to entitle him to relief, yet he will not be denied relief against a nuisance merely because his property to be affected by it is of small value or because his interest in the property is proportionately small. And if it be necessary to prevent a permanent injury to property, or its ruin from the erection and continuance of a nuisance, and the law cannot prevent the evil, equity will interfere, although the property itself may be of small value.⁴

§ 390. **Contributory Injury.** — The fact that others contribute to the production of the nuisance does not excuse the defendant.⁵ But this fact does not excuse the plaintiff of the burden of proving that the defendant does in fact contribute to the creation or maintenance of the nuisance. Thus, under a statute providing that local boards of health may file a bill in equity as relators, in the name of the state, for an injunction to prohibit the continuance of nuisances hazardous to public health, an injunction will not be granted to restrain the emptying of the sewage of certain buildings into a creek, where it appears that although the general use of the creek as a sewer is injurious to public health, the sewage contributed by the buildings in question is not by

¹ *Bernheimer v. Manhattan Ry. Co.*, 13 N. Y. S. 913.

² *Ibid.*

³ *Supra*, § 385.

⁴ *McCord v. Iker*, 12 Ohio, 388. See also *Arnold v. Keppler*, 24 Mo. 273; *Rhea v. Forsyth*, 37 Pa. St. 508; *Porter v. Whitman*, 17 Me. 292; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Norris v. Hill*, 1 Mich. 202; *Davis v. Londgreen*, 8 Neb. 43; *State v. Mobile*, 5 Port. (Ala.) 279; *Robeson v. Pittenger*, 1 Green (N. J.) Ch. 57; *Whitfield v. Rogers*, 26 Miss. 84.

⁵ *Evans v. Wilmington & W. R. Co.*, 96 N. C. 45; 1 S. E. 529.

itself, in any appreciable degree, hazardous to the public health.¹ On the other hand a nuisance cannot be justified by the existence of other nuisances of a similar character, if it can be shown that the inconvenience is increased by the nuisance complained of.²

§ 391. **Must be present Nuisance within Legal Sense.** — To warrant an injunction against an act or thing on the ground that it is a nuisance, it must be shown to actually exist within the legal definition of the term.³ A bill must set forth a nuisance at law; and in this connection the expression of an English author that "the fears of mankind however reasonable will not create a nuisance" is relevant.⁴ Accordingly the fact that a building in course of construction may when completed be used for a business which will be a nuisance to an adjoining owner, is not a ground for restraining the completion of the building, where it is not of itself a nuisance.⁵ In such case the court will deny the injunction, and leave the defendant at liberty to proceed with the erection of the building, at the risk of being restrained in the use of it, if a nuisance is ultimately created.⁶ Nor does the apprehended fouling or pollution of a stream of water in the future by the sewage of a part of a city from sewers, which have been legally, scientifically, and properly constructed, but which has not yet taken place, and of which there is no immediate or imminent danger, and which depends upon a contingency that may not happen, present a case for an injunction.⁷

¹ *State v. Board of Chosen Freeholders*, 51 N. J. 454; 18 A. 465; Act N. J. 1887.

² *Crossley v. Lightowler*, L. R. 2 Ch. 478.

³ *Ward v. Little Rock*, 41 Ark. 526; *Lansing v. Wiswall*, 5 Den. (N. Y.) 213; *Maynell v. Saltmarsh*, 1 Neb. 847; *Hart v. Bassett*, T. Jones, 156; *Dudley v. Kennedy*, 63 Me. 465; *Pierce v. Dart*, 7 Cow. (N. Y.) 609; *Chicester v. Lethbridge*, Willes, 71; *Rose v. Miles*, 4 M. & S. 101; *Hubert v. Groves*, 1 Esp. 148; *Enos v. Hamilton*, 27 Wis. 256; *Greasley v. Codling*, 2 Bing. 263; *Kilmovey v. Thackery*, 2 Bro. C. C. 65; *Bathurst v. Burden*, 2 Bro. C. C. 64; *Brown v. Watson*, 47 Me. 161; *Sanders v. Fowler*, Cro. Jac. 446; *Hughes v. Heiser*, 1 Binn. (Pa.) 463; *Martin v. Bliss*, 5 Blackf. n. s. 85; *Marriott v. Stanley*, 1 M. & Gr. 568; *Clark v. Lake*, 1 Scam. (Ill.) 229; *Goldthorpe v. Hardman*, 13 M. & W. 377.

⁴ *Joyce on Injunc.* p. 99.

⁵ *Depierris v. Mattern*, 10 N. Y. S. 626; *New York, N. H. & H. R. Co. v. Long*, 43 A. 559; 72 Conn. 10.

⁶ *Cleveland v. Citizens' Gas Light Co.*, 20 N. J. Eq. (5 C. E. Gr.) 201; *Thornton v. Roll*, 118 Ill. 350; 8 N. E. 145; *Atty.-Gen. v. Steward*, 20 N. J. Eq. 415; *Loring v. Small*, 50 Iowa, 271; s. c. 32 Am. Rep. 136; *Curtis v. Winslow*, 38 Vt. 690.

⁷ *City of Hutchinson v. Delano*, 46 Kan. 815; 26 P. 740. An injunction

And yet a court of equity will, under some circumstances, grant an injunction to restrain the erection of a nuisance, but with great caution, especially where there is a remedy at law, until the right has been settled by a verdict. And a court will always act with reluctance in abating a contingent nuisance, and seldom, if ever, until it has been found to be such by a jury.¹ And where the injury is merely anticipated and it is possible to conduct the business so as not to be a nuisance, it is held that an injunction should not be granted, even at suit of the attorney-general.²

§ 392. **Contingent and repeated Nuisance.** — It is important to keep in view the distinction between a merely anticipated injury or danger, and an injury which is of a continuing character or being constantly repeated. A continuous nuisance is very correctly defined as not necessarily an unceasing and constant injury, but one which occurs at stated times, as where a landowner habitually by means of a ditch causes the water which accumulates in a pond on his farm to be thrown upon the premises of an adjoining landowner.³ But the court will not interfere to pre-

should not be granted against the construction of a sewer by a city, where the injury complained of is that, in the course of two or three years, the sewerage discharged therefrom into a river *may* be so increased as to be deposited upon low grounds belonging to petitioner, lying along the river, and so poison and infect the air. *Morgan v. City of Binghamton*, 102 N. Y. 500; 7 N. E. 424.

¹ *Dunning v. Aurora*, 40 Ill. 481; *Dumesnil v. Dupont*, 18 B. Mon. (Ky.) 800; *Eastman v. Amoskeag, etc. Co.*, 47 N. H. 71.

² *Atty.-Gen. v. Stewart*, 5 C. E. Green, 415.

³ *Davis v. Londgreen*, 8 Neb. 43. See also *Georgia Chemical, etc. Co. v. Colquitt*, 72 Ga. 172; *Norwood v. Dickey*, 18 Ga. 528; *Swaine v. G. N. R. Co.*, 4 De G. J. & S. 211; *Bunnell's Appeal*, 69 Pa. St. 59; *Rochester v. Curtiss*, 1 Clarke (N. Y.), 336; *Heiskell v. Gross*, 3 Brewst. (Pa.) 430; *Harrison v. Newton*, 9 N. Y. Leg. Obs. 311; s. c. 1 Code, R. N. S. (N. Y.) 207; *Frankford v. Iennig*, 2 Phila. (Pa.) 403; s. c. 1 Am. L. Rep. 357; *Hough v. Doylestown*, 4 Brewst. (Pa.) 383; *Philadelphia's Appeal*, 78 Pa. St. 33; s. c. Phila. (Pa.) 499. In *Atty.-Gen. v. Kingston-upon-Thames (Mayor, etc.)*, 11 Jur. n. s. 596, the court said: "The very fact that a right has been violated, and that this violation is constantly going on, and that a court of law cannot in damages compensate the injury or stop the wrong, furnishes the best possible reason for the interference of a court of equity, and the fact that the actual injury resulting from the violation of the right is small, and the interest to be affected by the injunction is large, is not to weigh against the interposition of preventive power, when on the one hand a right is violated, and on the other a wrong committed." See also *Clowes v. Staffordshire, etc. Co.*, L. R. 8 Ch. App. 125.

vent a nuisance, caused by carrying on a trade, which is temporary and occasional only, and in such a case the court is not compelled to give damages, but may leave the plaintiff to his remedy at law.¹

§ 393. **Existence of Legal Remedies.** — There is a disposition of courts of equity to abdicate, in favor of courts vested with criminal jurisdiction, the regulation as well as the punishment of acts which constitute distinctive public nuisances. And yet notwithstanding the evident propriety of this policy and the existence of ample statutory provisions, everywhere, courts of equity are still vested with their common-law jurisdiction to give relief to private parties in all proper cases against nuisances, even of a public character. Nowhere has such jurisdiction been taken away by such statutes either expressly or by necessary implication. In such cases the public nuisance is considered *pro hæc vice* private. Instances of injunction in cases of public nuisances at the suit of private parties, however, have been rare as compared to cases of private nuisance, owing perhaps to the fact that an indictment lay at common law and generally by statute for the erection and maintenance of such nuisances.² Besides they could be abated by either private persons or by police officers even at common law without resort to legal proceedings.

§ 394. **Remedy at Law for Damage to Property.** — It is also a well-established rule that for a nuisance which results in a mere diminution of the value of property without irreparable mischief equitable relief is not available.³ The established rule in both this country and in England is that chancery has no power to in-

¹ *Swaine v. Great Northern Railway Co.*, 10 Jur. n. s. 191.

² See *Atty.-Gen. v. Heishon*, 18 N. J. Eq. 410; *Inhabitants of Raritan v. Port Reading R. Co.*, (N. J. Ch.) 23 A. 127; *Remington v. Foster*, 42 Wis. 608. Defendant, after having maintained for eighteen years a bridge over a public highway, twelve feet above the ground, connecting his building with railroad tracks, was indicted for maintaining a nuisance, and was tried and acquitted. Subsequently a bill was brought by the state to abate the nuisance. *Held*, that an order denying an injunction should not be disturbed. *Commonwealth v. Croushore*, (Pa. Sup.) 22 A. 807.

³ *Wynstanley v. Lee*, 2 Swanst. 336; *Earl of Ripon v. Hobart*, 3 Mylne & Keen, 169; s. c. 1 Cooper, Sel. Cas. 333. See *Morris, etc. R. R. v. Prudden*, 5 C. E. Green, 530; *Harrison v. Good*, L. R. 11 Eq. 388. W. made excavations in a lot adjoining a highway, and then sold the lot to defendant, who was ordered by the plaintiff township to fill up the excavations. Many months before suit brought in equity for an injunction, defendant had piled up clay within the limits of the highway. It was held that the township's remedy at

terpose in behalf of one who is injured by a nuisance whether it be continuing, permanent, or recurring, private or public, unless the injury be such as may not be compensated in damages.¹ But in a majority of cases the ground of the jurisdiction has been placed upon the broad ground of the ability of courts of equity to afford more appropriate and complete remedies than could be obtained at law, thus basing the jurisdiction upon the nature of the subject-matter, and the inherent ineffectiveness of legal remedies. But it is the exercise of an extraordinary power which should be "cautiously and sparingly exercised;"² and an injunction against a private nuisance will generally be granted only where there is a strong and mischievous case of pressing necessity, and not because of a trifling discomfort or inconvenience suffered by the complainant.³ The same observations apply, however, to all cases calling for relief by injunction.

§ 395. **Agreed Compensation — Plea of res adjudicata.** — For the same reason that where the injury resulting from a private nuisance is susceptible of computation in money a party will be denied relief in equity, an executed contract by the terms of which any act or structure not a nuisance *per se* is authorized or agreed to be tolerated for a valuable consideration, paid or agreed to be paid to a party, will estop him from maintaining an action to enjoin it,⁴ though it would be otherwise if the thing constituted a public nuisance *per se*, especially if indictable by statute. On the same principle, after an adjudication in condemnation proceedings that a railroad company, on paying a specified sum, shall become the owner of certain lands for the purpose of building a railroad upon them, the former owner, who was a party to the proceedings, cannot allege that the railroad which was accordingly built is a nuisance, the matter being *res adjudicata*.⁵ But where the nuisance or thing which may become a nuisance is not of a permanent and well-defined character, but of frequent recurrence, and no

law was ample, and that no case was shown for the interposition of a court of equity. *Woodbridge v. Inslee*, 37 N. J. Eq. 397.

¹ *Norris v. Hill*, 1 Man. 202; *Clack v. White*, 2 Sw. 540; 1 Gill & J. 184; *Wing v. Fairhaven*, 8 Cush. (Mass.) 363.

² *Ray v. Lynes*, 10 Ala. 63.

³ *Coker v. Birge*, 9 Ga. 425; s. c. 54 Am. Dec. 347, note; *St. James Church v. Arrington*, 36 Ala. 546.

⁴ *Infra*, § 401.

⁵ *Kerr v. West Shore R. Co.*, 2 N. Y. S. 686.

method is provided by statute for a final ascertainment of damages or complete compensation, an entirely different rule applies; and where the existence of a nuisance has been established at law, a court of equity will grant an injunction as a matter of course, if it is of a constantly recurring character, and especially if the damages recovered are merely nominal, and therefore inadequate to prevent a repetition of the injury.¹

§ 396. **Mere Depreciation in Value no Ground for Injunction.** — Injunction will not be granted on the ground that plaintiff's property has been depreciated in value by the erection of a building, so long as it is not actually devoted to some use which may be enjoined.² And in a suit to enjoin defendant from maintaining a nuisance by carrying on a slaughter-house in the vicinity of complainant's residence, complainant is not entitled to any decree on the ground that the existence of defendant's business depreciates the value of his property.³ The reason for refusing relief in such cases is that plaintiff has an adequate remedy at law by an action for damages.

§ 397. **Concurrent Legal and Equitable Remedies.** — In cases of private nuisances, the jurisdiction of courts of equity and of law is often concurrent, though many cases will sustain a legal action which would not justify relief in equity.⁴ Even in the case of public nuisances, notwithstanding the legal remedies for such, equity will interpose by injunction in a proper case, especially where the nuisance is of a permanent nature.⁵ And though the

¹ *Paddock v. Somes*, 102 Mo. 226; 14 S. W. 746.

ADJUDICATION OF RIGHTS UNDER LEASE. — Where the owner of a lot leased it for five years, with authority to erect a building for "confectionery purposes," and a building was erected and a saloon nuisance established therein, and, upon a preliminary hearing of a proceeding against the lessor, lessee, and saloon-keeper to abate the nuisance, a temporary injunction was granted, and thereafter the lessor served notice to quit on the lessee, and instituted proceedings for forcible entry and detainer against him, and prosecuted them vigorously, but unsuccessfully, both before the justice and in the district court, a judgment on the final hearing of the injunction proceedings dissolving the temporary injunction, and dismissing the proceeding as to him, was held not error. *Morgan v. Koestner*, (Iowa) 49 N. W. 80.

² *Stilwell v. Buffalo Riding Academy*, 4 N. Y. S. 414.

³ *Ballentine v. Webb*, 84 Mich. 38; 47 N. W. 485.

⁴ *Parker v. Winnipiseogee, etc. Co.*, 2 Black, 545. See *Burnham v. Kempton*, 44 N. H. 78; *Halsman v. Boiling Springs, etc. Co.*, 14 N. J. Eq. (1 McCart.) 335.

⁵ *County of Stearns v. St. Cloud, M. & A. R. Co.*, 36 Minn. 425; 32 N. W. 91. Though the governor, as authorized by Laws N. Y. 1880, c. 322, as

obstruction of a highway exists at the commencement of a suit to enjoin it, it may be abated by a mandatory injunction, as well as by a judgment that the obstruction be removed and the nuisance abated.¹ Nor is a court of equity ousted of its jurisdiction of a bill making out a clear case for its intervention, to abate a private nuisance, by the fact that the controlling question in the suit is the proper location of a boundary line, and that, as such location is a question of fact rather than of law, the defendant would be entitled in ejectment to three trials before as many juries.²

§ 398. **Statutory Remedy no Bar in Equity.** — Nor does the fact that remedies to be administered in a legal forum are provided by statute take away or lessen the power of courts of equity to enjoin nuisances, except so far as the legal remedies are expressly made exclusive. Accordingly it was held that the maintenance of a fence or like obstruction across a street, though a nuisance for which one injured is given a legal remedy, is also one which chancery will assume jurisdiction to abate, either on the ground of irreparable injury, or to prevent a multiplicity of suits.³ So the owner of a dwelling-house, and the land on which it stands, fronting on a town common, or public park, its situation upon which greatly enhances its value, may maintain injunction proceedings against his neighbor, who seeks to destroy the common by enclosing a large portion of it for his own use, although ample provision for the removal of nuisances and encroachments from highways by the public authorities is made in the statutes of the state.⁴ But the fact that courts of equity and law in a state have been combined in the same court does not give the latter jurisdiction which the two courts did not have, and does not affect the rule that injunction will not lie for the abatement of a nuisance,

amended by Laws 1882, c. 308, has declared a discharge of sewage to be a nuisance to the public health, and has ordered its abatement by the city council, a proceeding to enjoin the council from diverting the sewage does not fall within Code Civil Proc. § 605, providing that injunctions to restrain state officers from the discharge of their statutory duties shall only be granted at general term. *Vick v. City of Rochester*, 46 Hun, 607.

¹ *Gardner v. Stroeve*, 89 Cal. 26; 26 P. 618.

² *Wilmarth v. Woodcock*, 66 Mich. 331; 33 N. W. 400.

³ *City of Demopolis v. Webb*, 87 Ala. 659; 6 So. 408. Because a city has power to remove obstructions on its streets, it is not debarred from bringing suit to enjoin their erection. *Cheek v. Aurora*, 92 Ind. 107.

⁴ *Wheeler v. Bedford*, 54 Conn. 244; 7 A. 22.

in the absence of the allegation of special facts showing that the statutory remedy is inadequate.¹

§ 399. **Effect of City Ordinances on Subject.** — The existence of power in a municipality to regulate and abate nuisances does not, as has just been stated, deprive it of the right to have them enjoined. On the other hand, the mere fact that a certain thing is prohibited by ordinance does not render it a nuisance if it be not otherwise such, so as to authorize an individual or even the city itself to have it enjoined. For instance, the threatened violation of a city ordinance which attempts to regulate the erection of buildings, for the purpose of greater security against damage by fire, will not be restrained by injunction, unless the act sought to be prohibited is a nuisance in fact, and not merely made such by the ordinance.² So where an ordinance forbade the opening of any stone quarry within a certain distance of any dwelling-house, without first having obtained permission from the municipality, and forbade the working of such quarry without the consent in writing of the owner or occupant of such dwelling, it was held that, in the absence of an allegation that the quarry was or would be a nuisance, equity would not enjoin the opening thereof, merely because such opening was forbidden by the ordinance.³ On the other hand, the fact that the accumulation of nitro-glycerine within the corporate limits of a city is made a crime does not prevent a private citizen from having it enjoined, where in case of explosion he would suffer an injury in life or property not sustained by the public in general.⁴

§ 400. **Municipal Sanctions — Effect of Grant of Way to Railroad.** — The obstruction of the streets of a city being a nuisance *per se*, except to the extent of reasonable and necessary use, a permit from city authorities is of no avail as a defence, even in an action brought by the city.⁵ But where a city has granted a railroad

¹ *Broomhead v. Grant*, 83 Ga. 451; 10 S. E. 116.

² *City of Manchester v. Smyth*, (N. H.) 10 A. 700; *City of Janesville v. Carpenter*, 77 Wis. 288; 46 N. W. 128; *Young v. Scheu*, 9 N. Y. S. 349; 56 Hun, 307. To same effect, see *Stilwell v. Buffalo Riding Academy*, 4 N. Y. S. 414.

³ *Warren v. Cavanaugh*, 33 Mo. App. 102.

⁴ *People's Gas Co. v. Tyner*, (Ind. Sup.) 31 N. E. 59; *Greenfield Gas Co. v. People's Gas Co.*, Id. 61.

⁵ *Hoey v. Gilroy*, 14 N. Y. S. 159. In this case it was held that the municipal authorities are not estopped from removing a street-awning as an unlawful encroachment, by a stipulation made on their part in a former action

company the right to grade and use certain streets in such manner as may suit the company's convenience, provided that the streets shall be so graded that vehicles may conveniently cross them, the company cannot be enjoined, at the suit of the city, from so obstructing the streets as to prevent their free use by the public as public streets, but only from so grading them as to prevent vehicles from crossing.¹

§ 401. **Effect of Contract covering Subject.** — The right to an injunction is not impaired by the fact that the parties have entered into contracts or covenants covering the same subject-matter, since the inadequacy of a legal remedy for a breach still remains; as where blocks of buildings had been erected under covenants respecting the enjoyment thereof, and providing against the erection of livery stables, slaughter-houses, glue factories, and other special privileges or inconveniences.² And where a defendant owned a private sewer running through and discharging upon the plaintiff's land, and granted to another party the right to connect his hotel with such sewer, it was held, that injunction would lie to restrain the additional servitude.³ So the lessee of a building, who sub-lets it, may have an injunction against the erection of an awning, which would be a nuisance to his sub-tenants although he is neither owner of the fee, nor an occupant; and the fact that he has a remedy in damages for a breach of covenant does not preclude an action for an injunction on the ground of nuisance.⁴ But where the applicant for an injunction against an obstruction in a right of way to a city lot alleged to be a nuisance, and his purchaser, the defendant, had contracted with each other with respect to the use of such right of way, it was held that on failure of compliance the remedy was on the agreement and not by injunction.⁵ The distinction lies between public and private nuisances, and of the latter those may be contracted

between them and the owner of the awning, that, if it was made to conform to a city ordinance, it might be maintained as amended, pursuant to which it was so modified by the owner at considerable expense, when such order is invalid.

¹ *Chicago, B. & Q. R. Co. v. City of Quincy*, (Ill.) 27 N. E. 232.

² *Coker v. Birge*, 10 Ga. 336. See also *Barrow v. Richards*, 8 Paige, 351;

³ *Sugden on Vendors*, App'x, p. 361 (9th ed.); *Williams v. Earl of Jersey*, 1 Craig & Phillips, 91; *Wells v. Chapman*, 13 Barb. 173.

⁴ *Kiefer v. Graham*, (Com. Pl.) 17 Pa. Co. Ct. R. 361.

⁵ *Trenor v. Jackson*, 15 Abb. (N. Y.) Pr. N. S. 115; 46 How. Pr. 389.

⁶ *Gore v. Brubaker*, 55 Md. 87.

against which injure property or render its use and enjoyment less convenient and enjoyable.

§ 402. **Complainant's Right in Dispute.** — The court, in exercising the increased powers conferred on it by modern legislation in respect of legal rights, will have due regard to the principles upon which it formerly acted, and will not, therefore, entertain a suit where a party has had ample opportunity of trying his right at law and no action has been brought; as where a party had lain by, and allowed expenditures to be made, and a trade, which might be a nuisance in point of law, to be established, and carried on for a considerable period, without asking for the interference of the court, or bringing an action.¹ Equity will not enjoin what is claimed as a nuisance until the plaintiff's right is established by a judgment at law if there is any serious question as to its existence, unless the damage is, at the time of the application, and if allowed to remain will continue to be, irreparable.² But in a clear case it is not necessary to establish the right at law before coming to a court of equity.³

The rule requiring clear and satisfactory evidence is equally applicable to cases of private as to those of public nuisance.⁴ Thus,

¹ *Swaine v. Great N. Ry. Co.*, 9 Jur. n. s. 1196.

² *Coe v. Lake Co.*, 37 N. H. 254. One who seeks to abate an obstruction in a navigable stream and for an injunction must allege and show that the commerce for which he would utilize the stream is lawful. *Spokane Mill Co. v. Post*, (Cir. Ct.) 50 F. 429.

³ *Carlisle v. Cooper*, 6 C. E. Green, 576; *Hahn v. Thornberry*, 7 Bush (Ky.), 403. In *Corning v. Troy Factory*, 40 N. Y. 191, affirming s. c. 34 Barb. 485, 39 Barb. 311, Grover, J., says: "It is further insisted by the defendant that equity will not interpose until the right has been settled at law. That formerly was the universal rule, where there was any substantial doubt as to the legal right. *Gardner v. The Trustees of Newburgh*, 2 Johns. Ch. 162. But the rule no longer prevails in this state. We have before seen that all the relief to which a party is entitled, arising from the same transaction, may, under the code, be obtained in one suit."

⁴ *Hart v. Mayor of Albany*, 3 Paige, 210, 218; *Post v. Young*, (Pa. Com. Pl.) 7 Kulp, 102. See *Parker v. Winnipiseogee Lake, etc. Co.*, 1 Cliff. (C. C. R.) 247; *Rhodes v. Dunbar*, 57 Penn. St. 274; *Richard's Appeal*, Id. 105. An injunction was refused where sought for the abatement of a nuisance prohibited by the board of health of a town because the defendant had had no opportunity of presenting his defence before the board. *Winthrop v. Farrar*, 11 Allen, 398.

OBSTRUCTION IN PUBLIC WATER-WAY. — The railway company had become owners of a canal by purchase, and they were bound by several statutes to keep it open and navigable. The plaintiff was the owner of a mill abutting upon a sort of bay in the canal, which he alleged formed part of the canal

where a party owning property fronting on one of the streets of New York city filed a bill for an injunction to restrain a railway company from constructing the railway in front of his property, and on the trial the party owning the property failed to prove that he was the owner of any portion of the soil of the street, his property being bounded by one "side" of the street, it was held that the injunction could not be granted, it appearing that the corporation of the city of New York had on former occasions exercised acts of ownership over the soil of that street in front of the premises named in the deed.¹ So where a bill averred that the defendant illegally maintained a dam, by means of which back-water was thrown upon the complainant's mill-wheel, above, and prayed an injunction against such maintenance, and the answer set up a prescriptive right to maintain the dam as it was, and denied that the dam was the cause of the interference with complainant's wheel, it was held that the issues thus presented were not within the jurisdiction of the court of chancery.²

§ 403. **Prescriptive Right to Maintain Nuisance.** — It seems not to be definitely settled how far one can prescribe for the right to continue a nuisance, if such right may in any case be acquired by prescription. At any rate, to entitle one to such prescriptive right, as for instance to discharge sewage into a stream, clear proof must be adduced of its exercise for twenty years. It requires a very clear and long-continued case of inexcusable delay and acquiescence to justify a party in subjecting another's premises to what is clearly a nuisance. A less degree of acquiescence and sufferance may, however, in a case where the existence of a nuisance is doubtful, induce the court to withhold an interlocutory injunction.³

itself. This fact was denied by the defendants, who built a wall across the bay, so as to make the canal of the same width there as in other parts. The plaintiff filed his bill for an injunction to make the defendants undo what had been done, and to prevent them from doing more. *Held*, that the court could not make the defendants undo anything done; but that the plaintiff was entitled to an injunction to restrain them from proceeding to do more, on the plaintiff undertaking to bring an action at law to try the disputed right. *Bradbury v. Manchester, etc. Ry. Co.*, 15 Jur. 1167.

¹ *Currier v. West Side, etc. R. R. Co.*, 6 Blatchf. 487.

² *Outcalt v. Helme Co.*, 42 N. J. Eq. 665; 9 A. 683.

³ In *Atty.-Gen. v. Lunatic Asylum*, 4 Ch. App. 146, the question of the degree and kind of delay which will estop a party from claiming redress in cases of nuisance was extensively discussed. In *Atlanta v. Georgia R. R., etc. Co.*, 40

And when the right of a complainant in a bill to enjoin a nuisance to the relief sought is admitted by the answer, and the sole question of fact in controversy is whether the defendant has effected an abatement of the admitted nuisance, — *e. g.*, by reducing the height of a dam, the backwater from which overflowed the plaintiff's land, — the court has full jurisdiction to determine the question without ordering an issue to be tried by a jury.¹

§ 406. **Acts done under Statutory Authority cannot be enjoined.** — An injunction cannot be granted upon the ground of nuisance to restrain acts done in the lawful exercise of authority, conferred by statute.² Accordingly an injunction against the maintenance of a bridge constructed under statutory authority was refused.³

§ 407. **Legitimate Conduct of Business not enjoined.** — In a question of restraining a lawful business, a court of equity will consider the customs of the people, the characteristics of their business, the common uses of the property, and the peculiar circumstances of the locality.⁴ Whenever a locality loses its character as a place suitable for residence and becomes essentially a manufacturing neighborhood, where the business generally carried on is hostile to and inconsistent with its use as a place of residence, a court of equity will not interfere to prevent carrying on the business of manufacturing, even though the trembling motion and noise thereby occasioned renders it impossible to use adjoining premises as a dwelling. Accordingly upon a petition by a resident of a block originally built for business purposes, to restrain the carrying on therein of a steam flouring-mill in a proper manner, an injunction was refused, notwithstanding the annoyance; the block being in a proper business portion of a city.⁵ But concessions in favor of industry and trade do not justify encroachments upon what properly belongs to the people in common. Thus, it is well established that the occupants

¹ *Carlisle v. Cooper*, 21 N. J. Eq. 576.

² *Masterson v. Short*, 3 Abb. (N. Y.) Pr. n. s. 154. See Civ. Code Cal. sec. 3482.

³ *Hinchman v. Paterson, etc. R. Co.*, 2 C. E. Green (N. J.), 75. See also *Rex v. Pease*, 4 B. & A. 30; *McFarland v. Orange, etc.*, 2 Beas. (N. J.) 17. Compare *Le Clercq v. Trustees*, 7 Ohio, 218.

⁴ *Huckenstine's Appeal*, 70 Pa. St. 102. In this case an injunction against a brick-kiln, as injuring a vineyard and residence, was refused.

⁵ *Gilbert v. Showerman*, 2 Mich. 158.

of a building cannot appropriate the adjacent sidewalk for the purposes of their business by backing or placing vehicles upon it, and thereby obstruct and prevent the use of it by persons lawfully passing along the street on foot. And in an action to restrain such obstruction, which is established both by plaintiffs' affidavits and by admissions in defendants' answer, a preliminary injunction is properly continued *pendente lite*.¹

§ 408. **Acquiescence of Complainant as a Defence.** — While no degree of acquiescence or delay in applying for relief is a valid objection to granting an injunction against a public nuisance, especially if it be a nuisance *per se*, a somewhat different rule applies in the case of private nuisances. Thus, it was held that the fact that the noise caused by the removal of scenery and baggage from a theatre at night disturbed the sleep of persons living near by, was not sufficient to justify the setting aside an order refusing the issuance of a preliminary injunction restraining such removal, where said theatre had been in use for fifteen years.² So where a mining company had built and operated its first washer more than three years before complainant filed his bill to enjoin its use as polluting a watercourse, no objection being made, and the company from time to time had constructed and operated additional washers on the same stream, it was held, that complainant, having failed to exercise reasonable diligence, must be left to his remedy at law.³ What degree of acquiescence or delay will justify a denial of relief is largely a matter of judicial discretion to be exercised according to the facts presented in each case. In an English case Lord Chancellor Cottenham said that there was no fact before him to call for any opinion as to what degree of encouragement, or what circumstances leading to encouragement, would be sufficient.⁴

¹ Affirming 11 N. Y. S. 935; *Richardson & Boynton Co. v. Barstow Stove Co.*, 13 N. Y. S. 358.

² *Appeal of Penrose*, (Pa.) 21 A. 364. See also *Daugherty Typewriter Co. v. Kittanning Iron & Steel Manuf'g Co.*, 85 A. 1111; 178 Pa. St. 215.

³ *Clifton Iron Co. v. Dye*, 87 Ala. 468; 6 So. 192.

⁴ *Williams v. Earl of Jersey*, Cr. & P. 91. The owner of a two-story building lived in the second story, and rented the first story to tenants, who used it as a saloon. The owner was often about the saloon, and sometimes in it. He saw beer kegs and glasses therein, and drunken men about the place. *Held*, that these facts warranted a finding that the building was used as a saloon with his knowledge and permission, although the lease provided that the building should not be used for unlawful purposes. *De France v. Traverse*, (Iowa) 52 N. W. 247.

§ 409. **Same — Cases in which Delay no Defence.** — When the legal right of one who is injuriously affected by a private nuisance is settled, and the more efficacious remedy of a court of equity is necessary to complete relief, delay in applying to the court for such relief is no ground for a denial thereof, unless coupled with such acquiescence in the nuisance as deprives the complainant of all right to equitable relief.¹ Nor is the acquiescence of plaintiff's grantor in the acts of defendant any defence to the action for an injunction.² And though an injunction will not be granted when plaintiff has remained inactive, knowing that defendant, in good faith, was incurring great expense in prosecuting the work complained of as injurious, this rule does not apply to an application to restrain a city from committing a nuisance by certain sewage improvements, the right to do which has been denied by a judgment in a former action by one of the parties against the city, as in such case the city, being advised of the illegality of its action, is not acting in good faith.³ But a mere threat to take legal proceedings is insufficient to exclude the consequence of laches or acquiescence.⁴

§ 410. **The Allegations must be clear and specific.** — The bill should set forth such a state of facts as leaves no doubt upon either the question of nuisance or of its injurious results. In case of doubt upon either of these points, the benefit of it will be given to the defendant. A mere allegation of great and apprehended danger is not sufficient. The pleading should state the facts which show the danger to exist.⁵ And the allegations must be direct and positive, clear and unambiguous.⁶ To warrant an injunction against a threatened nuisance all the facts on

¹ *Carlisle v. Cooper*, 21 N. J. Eq. 576.

² *Learned v. Castle*, 78 Cal. 454; 21 P. 11.

³ *Vick v. City of Rochester*, 46 Hun, 607.

⁴ *Easton v. N. Y., etc. R. R. Co.*, 24 N. J. Eq. 49. In this case an injunction was refused against a railroad bridge over the Raritan River after the same had progressed several months, and large expenditures and liabilities had been incurred.

⁵ *Kingsbury v. Flowers*, 65 Ala. 486; *Cleveland v. Gaslight Co.*, 20 N. J. Eq. 202; *Wolcott v. Mellick*, 3 Stock. (N. J.) 205; *Van Wagenen v. Cooney*, 45 N. J. 24; 16 A. 689; *Branch Turnpike Co. v. Yuba Co.*, 13 Cal. 190; *Clark v. Lawrence*, 6 Jones (N. C.) Eq. 83; *Lake Erie & W. R. Co. v. City of Fremont, Ohio*, 92 F. 721; 34 C. C. A. 625.

⁶ *R. R. Co. v. Lancaster*, 62 Ala. 562; *Ex parte Reid*, 50 Ala. 444; 1 Dan. Ch. Pl. & Pr. 313; *Read v. Walker*, 18 Ala. 329; *Adams v. Michael*, 38 Md. 125.

which the right to relief is based should be set forth in the bill, and if the facts are denied in the answer they must be sustained by proof on the trial.¹ This is especially true where the injury arises not from the nature of the structure or thing alleged to create the nuisance, but from the uses to which it is to be devoted.²

§ 411. **Evidence must be clear and convincing.** — An injunction to restrain a nuisance will issue only in cases where the fact of nuisance is made out upon determinate and satisfactory evidence, and if the evidence be conflicting, and the injury be doubtful, that will constitute a ground for withholding the injunction, and, if the nuisance be merely apprehended, it must appear that apprehension of material and irreparable injury is well grounded, upon a state of facts which show the danger to be real and immediate.³ But if the allegations are not controverted, they must be taken as true; and in such case it is not necessary, in order for the plaintiffs to recover, to introduce any evidence whatever.⁴ And if there is any evidence to support the finding of the court it will not be disturbed though a preponderance be against it.⁵ The court may, in all cases, where the evidence is conflicting, direct an issue to be tried before a jury to determine the facts.⁶

¹ Imperial Gas Co. v. Broadbent, 7 H. L. Cas. 600; Thebaut v. Canova, 11 Fla. 143, 224; Newark Aqueduct Board v. City of Passaic, (N. J.) 20 A. 54; Haines v. Taylor, 10 Beav. 75; Ripon v. Hobart, 3 Myl. & K. 169.

² Duncan v. Hays, 22 N. J. Eq. 25; Flin v. Russell, 5 Dill. (U. S.) 151. Where upon the bill and answer the structure complained of is not *prima facie* a nuisance, the injunction will not be continued, but the defendant will proceed with his acts at his peril. Cunningham v. Rice, 28 Ga. 30. It was held that a bill to enjoin a factory for the manufacture of felt roofing must state specifically and definitely all the facts and circumstances necessary to enable the court to determine whether the nuisance will be of the nature and character anticipated, and such as will sensibly and materially diminish the value of the complainant's property or the comfort or enjoyment thereof. Adams v. Michael, 38 Md. 123.

³ Newark Aqueduct Board v. City of Passaic, 45 N. J. Eq. 393; 18 A. 106; Hahn v. Thornberry, 7 Bush (Ky.), 403; Appeal of Morgan, (Pa.) 19 A. 628; 25 W. N. C. 532; Connor v. Fisher, (Com. Pl.) 8 Kulp. 262; Pennsylvania R. Co. v. Railway Co., 57 N. J. Law, 457; Stilwell v. Buffalo Riding Academy, 4 N. Y. S. 414; McCurdy v. Noak, 17 L. J. n. s. Ch. 165.

⁴ Peisch v. Linder, 73 Iowa, 766; 33 N. W. 133; on authority of Bloomer v. Glendy, 70 Iowa, 757; 30 N. W. 486. See also Farley v. Hollenfelz, 79 Iowa, 126; 44 N. W. 243.

⁵ Sickinger v. State, 45 Kan. 414; 25 P. 868.

⁶ Clark v. Lawrence, 6 Jones (N. C.) Eq. 83; Frizzle v. Patrick, Id. 354.

§ 412. **Relief of Mandatory Character.** — There is no general rule against granting relief by mandatory injunction, interlocutory, where the damage has been completed before the filing of the bill; and there is no difference between the case of injury to easements and injury to other rights. It was said that an injunction to restrain the defendant from raising the water from his mill-pond above a certain height was not mandatory, but if it were strictly mandatory, that would not constitute a valid objection to it.¹

§ 413. **Method of Compliance rests with Defendant.** — The applicant for an injunction to restrain a nuisance will not be required to inform the court how the defendants will be enabled to comply with the injunction. If he makes a case it is the duty of the court to grant an injunction, and it will be for the defendants to apply for a suspension or relaxation of the order where that becomes necessary.²

§ 414. **Priority of Occupancy immaterial.** — The occupier of a house is liable for allowing the continuance on his premises of any artificial work which causes a nuisance to a neighbor, even though it has been put there before he took possession. In such a case it was held, that the plaintiffs were entitled to an injunction to prevent the defendant from keeping horses in his stable so as to be a nuisance, and that defendant was also liable for not preventing the damp from going through plaintiff's wall.³

§ 415. **Motives of Defendant not important.** — If an act or thing causes material and constant annoyance to another so as to constitute it in fact a nuisance, the motives of the party in doing the acts or maintaining the obnoxious thing are immaterial as regards the complainant's right to have it enjoined. Thus, in such an action it was held that the issue was not as to defendants' motives in keeping bees, nor whether they had knowledge of any vicious propensities of the bees, but simply whether the condition of things, as then and previously existing, constituted a nuisance.⁴ But where the party complained against had acted in good faith, and sought to abate the nuisance before the in-

¹ Longwood, etc. R. R. Co. v. Baker, 27 N. J. Eq. 166.

² Att.-Gen. v. Visitors of Lunatic Asylum, L. R. 4 Ch. App. 146; s. c. 17 W. R. 240.

³ Broder v. Saillard L. R. 2 Ch. Div. 692. See also Ball v. Ray, L. R. 8 Ch. 467.

⁴ Olmstead v. Rich, 6 N. Y. S. 826; Wilmarth v. Woodcock, 66 Mich 331.

stitution of the suit, it was held, that a preliminary injunction was properly denied.¹

§ 416. **Abatement pending Suit.** — But after suit to abate and enjoin a nuisance has been actually begun, the defendant cannot, by partially abating the nuisance, pending the suit, defeat the complainant's right to that complete redress to which he was entitled when he sought his remedy.² So where the nuisance complained of was the keeping and using premises for the sale of intoxicating liquors, an injunction was granted to restrain the keeper of the premises from so using them in the future, although the nuisance had been abated.³

§ 417. **Relative Injury and Inconvenience to Parties considered.** — In cases of private nuisances a court of equity will balance the inconvenience likely to be incurred by the respective parties in exercising its discretion to grant or withhold relief; and where greater harm would result from enjoining than from refusing to enjoin, the injunction will be refused.⁴ In determining whether relief ought to be granted, regard will be had not only to the comfort and convenience of the occupier of the land for the time being, but to the prospective effect of the nuisance in diminishing the value of the land.⁵

The same discretionary power is vested in the court where the alleged nuisance is of a public character; and the court will consider the injuries which may result to the public by granting the injunction as well as the injuries to be sustained by complainant in refusing it.⁶ Where the public benefit derived from the thing complained of outweighs the private inconvenience, an injunction will not be granted;⁷ and courts habitually exercise great caution in enjoining acts alleged to constitute public nuisances, at the suit of private parties, lest in protecting the latter

¹ *Distinguishing Judge v. Kribs*, 71 Iowa, 183; 32 N. W. 324; *Shear v. Brinkman*, 72 Iowa, 698; 34 N. W. 483.

² *Carlisle v. Cooper*, 21 N. J. Eq. 576.

³ *Judge v. Kribs*, 71 Iowa, 183; 32 N. W. 324. Compare *Shear v. Brinkman*, 72 Iowa, 698; 34 N. W. 483.

⁴ *Richard's Appeal*, 57 Pa. St. 105. See *Eastman v. Amoskeag Manuf. Co.*, 47 N. H. 71.

⁵ *Goldsmid v. Tunbridge Wells Impr. Co.*, L. R. 1 Eq. 161; 12 Jur. n. s. 308.

⁶ *Clifton Iron Co. v. Dye*, 87 Ala. 468; 6 So. 192.

⁷ *Eason v. Perkins*, 2 Dev. (N. C.) Eq. 38; *Atty.-Gen. v. Lea's Heirs*, 3 Ired. (N. C.) Eq. 302; *Wilder v. Strickland*, 2 Jones (N. C.) Eq. 386; *Harrison v. Brooks*, 20 Ga. 537.

much greater injury be done to the public. Where the evidence is conflicting and the public injury doubtful, that alone constitutes good reason for withholding this extraordinary relief.¹ For these reasons, a railroad being not *per se* a nuisance, a strong case must be presented to justify an injunction against its construction on the ground of injury to the public.²

§ 418. **Partial and Modified Relief.** — In finally passing upon the rights and equities of the parties to an action to restrain a nuisance, the court has the fullest discretionary power to adapt

¹ *Drake v. Hudson River Railroad Co.*, 7 Barb. S. C. 508; *Hamilton v. The New York & Harlem Railroad*, 9 Paige, 171; *People v. Davidson*, 30 Cal. 379; *Earl of Ripon v. Hobart*, 1 Cooper Sel. Cas. 383; s. c. 3 Mylne & Keen, 169; *Mohawk Bridge Co. v. Utica & Schenectady Railroad Company*, 6 Paige, 559, 563; *Spencer v. London & Birmingham Railway Co.*, 8 Sim. 193. See also *Lake View v. Letz*, 44 Ill. 81; *Sheboygan v. Sheboygan, etc. R. R. Co.*, 21 Wis. 667; *Varney v. Pope*, 60 Me. 192; *Atty.-Gen. v. Woods*, 108 Mass. 436. In *Ripon (Earl) v. Hobart*, *supra*, Lord Brougham gave the following able exposition of the true policy by which courts of equity should be governed in granting and refusing injunctive relief in cases of suits by private parties against public nuisances. "In considering more generally the question which is raised by the present motion, I certainly think we shall not go beyond what both principle and authority justify, if we lay down the rule respecting the relief by injunction, as applied to such cases as this. If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief without waiting for the result of a trial, and will, according to the circumstances, direct an issue or allow an action, and, if need be, expedite the proceedings, the injunction being in the mean time continued. But, where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may according to circumstances prove so, then the court will refuse to interfere until the matter has been tried at law, generally by an action, though in particular cases an issue may be directed for the satisfaction of the court, where an action could not be framed so as to meet the question. The distinction between the two kinds of erection or operation is obvious, and the soundness of that discretion seems undeniable which would be very slow to interfere, where the thing to be stopped, while it is highly beneficial to one party, may very possibly be prejudicial to none. The great fitness of pausing much before we interrupt men in those modes of enjoying or improving their property which are *prima facie* harmless or even praiseworthy, is equally manifest. And it is always to be borne in mind that the jurisdiction of this court over nuisance by injunction at all is of recent growth, has not till very lately been much exercised, and has at various times found great reluctance on the part of the learned judges to use it even in cases where the thing or the act complained of was admitted to be directly and immediately hurtful to the complainant." Citing and reviewing early English authorities.

² See *Drake v. The Hudson River Railroad Company*, 7 Barb. S. C. 508; *Herbert v. Pennsylvania R. Co.*, 43 N. J. 21; 10 A. 872; *Lexington, etc. Co. v. Applegate*, 8 Dana, 289; *Hamilton v. The New York & H. Railroad*, 9 Paige, 171; 4 Eds. Ch. 411. See *Morris, etc. R. R. v. Prudden*, 5 C. E. Green, 530.

its decree to the proofs in the case, in view of the convenience of the parties and the public.¹ And where the resulting annoyances are such as can be remedied, injunction restraining defendant from carrying on his business at all is error, and must be modified.² Thus, in a suit to enjoin defendant from maintaining a nuisance by carrying on a slaughter-house in the vicinity of complainant's residence, it appearing that its offensiveness could be largely avoided thereby, it was held that defendant should be required to move daily in closed wagons all refuse, to cleanse and disinfect his premises daily, and to provide pens sufficient to hold his hogs without crowding, so as to render them less noisy.³ So in a suit to restrain defendant from obstructing a sidewalk, wherein the court rendered a decree perpetually enjoining him from using a plank or bridge elevated above the sidewalk in unloading trucks, and from hindering plaintiffs from the free use of the sidewalk, it was held that the decree should be modified so as to enjoin him from "unnecessarily or unreasonably" using such bridges, or hindering or obstructing the free use of the sidewalk.⁴

¹ *Sullivan v. Royer*, 72 Cal. 248, 18 P. 655. In this case the complaint asked "that said nuisance be abated." *Held*, that an injunction suitable to the facts of the case was the proper mode of granting the relief, although it was not expressly prayed for. A railroad company will not be enjoined from using its main tracks for the purpose of making up trains and shifting cars, on the ground of inconvenience and annoyance thereby caused one living near its track, where no abuse or negligent use of its franchise is shown, though Revision N. J. p. 919, § 65, expressly provides for the condemnation of land for such purposes as part of the terminal business of a railroad company. *Beideman v. Atlantic City R. Co.*, (N. J.) 19 A. 731.

² *McMenomy v. Baud*, (Cal.) 26 P. 795.

³ *Ballentine v. Webb*, 84 Mich. 38; 47 N. W. 485.

BONE-BOILING ESTABLISHMENT. — Plaintiffs, residents and owners of property in a thickly populated neighborhood, filed a bill asking that defendants should be enjoined from erecting a building for a bone-boiling establishment. *Held*, that an injunction restraining the use of the buildings as a bone-boiling establishment was properly issued, but that the erection of the buildings was not a nuisance, and the portion of an injunction restraining that must be dissolved. *Appeal of Czarniecki*, (Pa.) 11 A. 660.

⁴ *Callanan v. Gilman*, 107 N. Y. 360; 14 N. E. 264. An injunction restraining the use of a certain portion of a street by a railroad for unloading cars and as a switching-yard will affect that portion of the street only, and will not prevent its use as a connecting link between the railroads concerned. *Kavanagh v. Mobile & G. R. Co.*, 78 Ga. 803; 4 S. E. 113.

II. ILLUSTRATIONS OF THE JURISDICTION.

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| <p>§ 419. Purprestures and Nuisances upon Water.</p> <p>420. Bridge across Navigable Stream.</p> <p>421. Railroad in Street or in Public Highway.</p> <p>422. Side-track in Street — Unloading Cars.</p> <p>423. Obstructions in Street or Highway.</p> <p>424. Telephone Poles and Wires in Street.</p> <p>425. Obstructing View of Street.</p> <p>426. Nuisance resulting from Acts of Public Boards.</p> <p>427. Burial Grounds.</p> <p>428. Disturbance caused by Machinery.</p> | <p>§ 429. Burning Brick.</p> <p>430. Offensive Smells.</p> <p>431. Noise.</p> <p>432. Smoke.</p> <p>433. Lunatic Asylum.</p> <p>434. Disorderly Crowds.</p> <p>435. Keeping Bees.</p> <p>436. Sale of Intoxicating Liquors.</p> <p>437. Domestic Broils.</p> <p>438. Constant Danger.</p> <p>439. Railroad Cattle-yard.</p> <p>440. Miscellaneous — Dangerous Bridge — Rifle Range — Chinese Laundry.</p> <p>441. Nuisances resulting from Manner of using one's own Property.</p> |
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§ 419. **Purprestures and Nuisances upon Water.** — Informations in equity have been maintained by public authorities against stoppage of highways amounting to public nuisances and against nuisances to harbors, as well as in cases of purprestures upon rivers and other public waters.¹ It is held that injunction, in cases of public nuisances or purprestures, are only to be granted in order to prevent irreparable mischief, continual, oppressive, or vexatious litigation.² And an injunction will not lie, at suit of a private party requiring the removal of a structure built on shoal water in front of his lot, and restraining the erection of similar structures, which impede navigation, unless he has sustained special damage.³

§ 420. **Bridge across Navigable Stream.** — Whether a bridge across a navigable river constitutes a nuisance depends upon

¹ *Attorney-General v. Cleaver*, 18 Ves. 217, 218; *Crowder v. Tinkler*, 19 Ves. 620, 622; *Barnes v. Baker*, Ambl. 158; *Attorney-General v. Forbes*, 2 Mylne & Craig, 143; *Mohawk Bridge Company v. Utica & Schenectady Railroad Co.*, 6 Paige, 554; *Attorney-General v. Cohoes Company*, 6 Paige, 133; *Commonwealth v. Young Men's Christian Ass'n of Warren*, (Pa. Sup.) 32 A. 121; 169 Pa. St. 24. The remedy by injunction, at the relation of the harbor commissioners, under Mass. Stat. 1866, ch. 149, sec. 5, against unlawful "erections or works" "within tide-waters flowing into or through any harbor," is cumulative; and applicable to any case within the statute. *Attorney-General v. Woods*, 108 Mass. 436.

² *Silliman v. Hudson River Bridge Co.*, 4 Blatch. 395; *Parker v. Winnipiseogee Lake, etc. Co.*, 1 Cliff. 247; *Middleton v. Franklin*, 3 Cal. 238; *Tebaut v. Canova*, 11 Fla. 143; *Fort v. Graves*, 29 Md. 188; *Hinchman v. Paterson R. R. Co.*, 17 N. J. Eq. 75.

³ *Alden v. Pinney*, 12 Fla. 348.

many considerations, public as well as private. A court of equity in determining its character will consider the extent of its interference with navigation, and the relative importance of the traffic over the bridge, whether for railroad or other purposes, as compared with that on the river, and decree according to the facts and the true interests of the general public.¹ A preliminary injunction to restrain the erection of such a structure will not be allowed where it is shown that the bridge will not be an obstruction necessarily amounting to a nuisance.² Accordingly it was held that the construction of a bridge over a canal should not be restrained by injunction at the suit of the canal company, it not appearing that such bridge would interfere with the use of the canal.³ But upon such special damage being shown, a private individual will be entitled to have the obstruction removed or restrained.⁴ And it may be enjoined by the municipal corporation whose use of its wharves and docks is thereby interfered with.⁵

§ 421. **Railroad in Street or on Public Highway.** — The right to maintain an action to enjoin the construction or maintenance of a railroad in a street or public highway is with the owner of the fee, except where special damage to another is inflicted.⁶

¹ *Pennsylvania v. Wheeling, etc. Bridge Co.*, 13 How. (U. S.) 518.

² *Northern Pacific R. R. Co. v. Barnesville & Morehead R. R. Co.*, 2 McCrary C. Ct. 224.

³ *Savannah & O. Canal Co. v. Suburban & W. E. Ry. Co.*, (Ga.) 18 S. E. 824.

⁴ *Frink v. Lawrence*, 20 Conn. 117; *Philadelphia v. Passenger R. Co.*, 8 Phila. (Pa.) 648; *Ewell v. Greenwood*, 26 Iowa, 377; *Philadelphia v. Crump*, 1 Brewst. (Pa.) 820; s. c. 6 Phila. (Pa.) 275; *Beveridge v. Lacey*, 8 Rand. (Va.) 63; *Williams v. Smith*, 22 Wis. 594; *Robinson v. Baugh*, 81 Mich. 290. A private party whose rights are seriously interfered with, may have an injunction against such structure, at least until compensated for property taken or injured. *Hudson River Co. v. Loeb*, 7 Rob. (N. Y.) 219. See *Manhattan Gas Light Co. v. Barker*, 7 Rob. (N. Y.) 528; s. c. 36 How. (N. Y.) Pr. 233; *Charleston, etc. R. Co. v. Johnson*, 73 Ga. 306. An injunction against the erection of a bridge over a navigable river, — dissolved upon the passage of an act of Congress authorizing the construction of such bridge. *Baird v. Shore Line Co.*, 6 Blatch. 461.

⁵ *New York v. Baumberger*, 7 Rob. (N. Y.) 219. The subject of infringements to riparian rights and rights in water fully considered, chap. v.

⁶ *Osborne v. Brooklyn, etc. R. R. Co.*, 5 Blatch. 366. Injunction to restrain a railroad company from laying down a railroad track in New Orleans, upon the application of a citizen, denied, on the ground that the evidence failed to show that the laying of the track would produce injurious results. *Hoyl v. New Orleans City R. R. Co.*, 23 La. An. 535.

And where the fee of streets is in the city within whose boundaries they are located, and the city has the power to control and regulate their use, a court of equity will not, at the suit of an individual, enjoin a railway company from operating its road laid in the street without the permission of the city, but will leave the redress to the public authorities.¹ But a temporary injunction restraining the construction of a side-track for a steam railway in the streets of a city may be granted at the instance of a citizen alleging special damage to his land in the vicinity of the nuisance.²

§ 422. **Side-track in Street — Unloading Cars.** — An element of a nuisance being that a switching-yard is made of the street, and that engines are constantly passing, carrying cars to the yard of the company, a prayer to restrain the shifting and transferring of freight cars between said street (meaning that part of it which is the scene of the nuisance) and the grounds of the company is proper, and should be granted;³ and in such case the nuisance complained of being in part the loading and unloading of freight cars in the street from a side-track, to cease doing these acts from the side-track, and then do them instead from the main track, would be a virtual continuance of the nuisance.⁴

§ 423. **Obstructions in Street or Highway.** — Obstructions in streets and highways which are calculated to and do have the effect of impeding and obstructing travel, are among the commonest instances of public nuisance.⁵ The erection of weigh-

Injunction refused in a case where it was sought to restrain a railroad company from constructing its road across certain streets, thereby preventing the passage of teams, etc., by reason of a high embankment, the evidence showing that the city could at a small expense make a road under the railroad, while the expense to the company in changing its route, or bridging the street, would be very great. *Hackensack Improvement Com. v. New Jersey, etc.*, 22 N. J. Eq. 94. See *District Attorney v. Lynn, etc. R. R. Co.*, 82 Mass. (16 Gray) 242.

¹ *Patterson v. Chicago, D. & V. R. R. Co.*, 75 Ill. 588.

² *Savannah & W. R. Co. v. Woodruff*, 86 Ga. 94; 18 S. E. 156. An owner of a lot abutting on a street through which a railroad company is laying its track, cannot demand an injunction on the ground that its damages are all ascertainable in one action at law. *Smith v. Point Pleasant & Ohio R. R. Co.*, 23 W. Va. 451.

³ *Kavanagh v. Mobile & G. R. Co.*, 78 Ga. 808; 4 S. E. 113.

⁴ *Ibid.*

⁵ *Morris Canal, etc. Co. v. Fagan*, 18 N. J. Eq. 215; *Pettibone v. Hamilton*, 40 Wis. 402; *County of Stearns v. St. Cloud, M. & A. R. Co.*, 36 Minn. 425;

scales upon a public highway in such a manner as to obstruct it;¹ leaving snow which it removes from its tracks, heaped up between them and the plaintiff's premises for a longer period than reasonably requisite for taking it away, by a railroad company;² an awning permanently constructed and imbedded in the soil of the street and encroaching thereon,³ have each been held such a nuisance as warranted relief by injunction, sometimes at suit of public authorities, and in other instances on application of individuals showing special injury.⁴

§ 424. **Telephone Poles and Wires in Street.** — As in other cases of obstructing streets and highways, a preliminary injunction will not be granted to restrain a telephone company from erecting poles in the street in front of a lot-owner's property, and from stretching wires therefrom, except in a case of urgent necessity and probable irreparable injury.⁵ But under a statute providing that a telephone company must obtain a designation of the streets in which it will be allowed to place its poles before erecting them, and also obtain the written consent of the adjoining landowner, a telephone company erecting its poles in a public road, against the protest of the adjoining lot-owner, will be compelled, by mandatory injunction, at the suit of such person, to remove poles so erected, and prohibited from erecting others, notwithstanding that such company had the consent of the public-road board of the town to place the poles where it did.⁶

32 N. W. 91. See also *Knox v. New York*, 55 Barb. 404; *Savannah, etc. R. R. v. Shiels*, 33 Ga. 601; *Ewell v. Greenwood*, 26 Ia. 377.

BUILDING IN PUBLIC SQUARE. — The erection of a private building upon land reserved for a public square and which has been illegally sold by the public authorities is a nuisance of such irreparable nature as to give a court jurisdiction to grant a perpetual injunction. *The Commonwealth v. Rush*, 14 Pa. St. 186; *Williams v. Smith*, 22 Wis. 594.

¹ *Huddleston v. Township of Killback*, (Pa.) 7 A. 210.

² *Prime v. Twenty-third Street R. R. Co.*, 1 Abb. (N. Y.) N. Cas. 63.

³ *Hoey v. Gilroy*, 14 N. Y. S. 159.

⁴ See *Hall v. Rood*, 40 Mich. 46; *Luhre v. Studevant*, 10 Or. 170; *Coykendall v. Durkee*, 20 N. Y. S. Ct. 260; *Buffalo v. Harling*, (Minn.) 52 N. W. 931. An averment by such lot-owners, that such obstruction will greatly diminish the value of their lots and buildings, and will greatly increase the liability of the buildings to fire, and will otherwise greatly injure their property, is a sufficient allegation of special injury. *Pettibone v. Hamilton*, 40 Wis. 402. Further, as to the nature of the injury entitling private party to sue, see *supra*, §§ 385-388.

⁵ *Roake v. American Telephone & Telegraph Co.*, 41 N. J. 35; 2 A. 618.

⁶ *Broome v. New York & New Jersey Telephone Co.*, 42 N. J. Eq. 141; 7 A. 851.

§ 425. **Obstructing View of Street.** — As a general rule, unless the street be actually obstructed to the material injury or inconvenience of a party, he will not be entitled to an injunction to restrain a structure which merely obstructs his view of the street.¹ But there may be such circumstances of spite and malice in an act which only deprives one of light and air, though the act be done on defendant's own premises and the street be not thereby obstructed, as will entitle complainant to relief by injunction.²

§ 426. **Nuisance resulting from Acts of Public Boards.** — A party is entitled to an injunction to restrain pollution of water passing by his property, though it be done by direction of a local board of health; and it is no answer to an information to abate a nuisance arising from sewage, that the board has power itself to remedy the evil by making sewers; because it is the duty of the board to prevent a nuisance arising in its district, instead of putting the ratepayers to the expense of additional works. If a public body which has power given it by statute for the performance of a particular object, exercises its power so as to injure the property of others, it is responsible for the injury, unless the act done was absolutely necessary for the performance of the object of the statute.³

§ 427. **Burial Grounds.** — Whenever it can be clearly proved that a burial ground is so situated that interments there will endanger life or health by corrupting the surrounding atmosphere, or the water of wells or springs, equity will relieve by injunction.⁴

¹ *Hay v. Weber*, 79 Wis. 587; 48 N. W. 859; *Gray v. Baynard*, 5 Del. Ch. 499.

² *Flaherty v. Moran*, 81 Mich. 52; 45 N. W. 381.

³ *Bidder v. Croydon Local Board of Health*, 6 L. T. N. S. 778. See also *Attorney-General v. Birmingham*, 4 K. & J. 528; *Broadbent v. Imperial Gas Co.*, 7 De G. M. & G. 436, where the propriety of restraining such nuisances by injunction was extensively discussed. *The Manchester, Sheffield, etc. Railw. Co. v. The Workshop Board of Health*, 23 Beav. 198.

SMALL-POX HOSPITAL. — The plaintiffs were the owners of houses, in proximity to which the defendants, a rural sanitary authority, had established a small-pox hospital. In an action to restrain the user of the hospital on the ground of nuisance, the court being satisfied on the evidence that the plaintiffs had made out a case of real appreciable injury, though not a great one, granted an interim injunction. *Bendelow v. The Guardians of Wortley Union*, 57 L. J. Ch. 762.

⁴ *Clark v. Lawrence*, 6 Jones (N. C.) Eq. 83. Where township trustees are

§ 428. **Disturbance caused by Machinery.** — Courts are very reluctant to enjoin the operation of machinery employed in manufacturing and other industries, and will seldom if ever do so when operated in a usual and legitimate manner, especially where manufacturing is extensively carried on. In such cases the relative loss and inconvenience to the parties of stopping the work or allowing it to proceed, will be considered.¹ And it has been held that more than mere discomfort and annoyance from the noise and vibration of the machinery must be shown to warrant interference; that pecuniary loss such as loss of business must be shown.² But an injunction was granted to restrain a defendant from working a steam hammer in such a way as to cause a nuisance or injury to plaintiff and his premises.³ An endeavoring to establish a cemetery within two hundred yards of a dwelling, in violation of a statute, they may be enjoined in a suit by the owner of the dwelling. *Henry v. Trustees Perry Tp.*, Ohio Sup. 30 N. E. 1123.

¹ *Braender v. Harlem Lighting Co.*, 2 N. Y. S. 245. In this case the facts were that defendant operated an electric light station before plaintiff purchased the adjoining houses, but later erected an extension, and placed therein a four hundred horse-power engine and a sixteen feet cog-wheel. The machinery could have been driven with smaller engines and belts, with little injury to plaintiff's property, but the large engine and wheel caused a jar and annoying noises after night, without causing permanent injury to the building. The extension and engine were properly constructed, and the business carefully conducted. Smaller engines would occupy more space, and require greater expense. Defendant had invested about \$200,000, and furnished light to the city and many merchants. New buildings were under construction, into which defendant intended removing, when the station complained of would be discontinued. *Held*, that, while defendant's business was a nuisance and should be restrained, in view of the fact that compensation in damages could be made, and that great loss to the defendant and inconvenience to the public would result from its immediate suspension, time should be given defendants to remove its plant before the judgment should take effect.

² *Straus v. Barnett*, 140 Pa. 111; 21 A. 253. Compare *Jones v. Chappell*, L. R. 20 Eq. 539. In a suit to enjoin defendant from maintaining a nuisance by operating an electric light plant adjoining complainants' dwelling-house, the evidence showed that the plant was of great public utility, and the machinery of the best quality; that the officers and agents were skilful; and that the annoyances from smoke, soot, noise, and vibrations had been materially lessened during defendant's ownership, — one witness testifying that they were not one-hundredth part as great as formerly. The evidence in regard to the vibrations of the house, caused by the engine, was conflicting; and one witness testified that they were not greater than those usually caused by a passing dray. *Held*, that the evidence did not prove more annoyance than is usually incident to a residence in a city, or such annoyances as could not be prevented by labor and money, for which there was redress at law. *English v. Progress Electric Light & Motor Co.*, (Ala.) 10 So. 134.

³ *Goose v. Bedford*, 21 W. R. 449. See also *Heather v. Pardon*, 37 L. T.

injunction was refused where it appeared that complainant's house was nine inches over his line on defendant's land, and that if that were not so the shaking complained of would not disturb him.¹

§ 429. **Burning Brick.** — The manufacture of brick upon one's lands in which a process is used by which noxious gases are generated which are borne by the winds upon the adjacent lands of neighbors, injuring and destroying trees and vegetation, is a nuisance, and the party injured is entitled to an injunction to restrain the use of the process complained of.² But brick making, being a useful and necessary employment, will not be restrained by injunction, if conducted in the usual and a reasonable manner, although carried on in the outskirts of a city, merely because it occasions some discomfort or even some injury in the vicinity.³

§ 430. **Offensive Smells.** — Offensive smells and stenches are inseparably connected with many forms of manufacturing, and may be produced by various means unnecessary to mention. They contribute to several kinds of nuisance considered under other heads, but may alone constitute a nuisance warranting preventive relief. And it is no reason for refusing an injunction in such a case that the fumes tend to neutralize a malaria existing in the locality, or that the place is one where manufacturing is considerably carried on, or that the nuisance existed before the plaintiff acquired his property or built his house, at least when there is not shown so long a continuance as to establish a prescriptive right.⁴

N. S. 393 ; *Gullick v. Tremlett*, 20 W. R. 358 ; *Crump v. Lambert*, L. R. 3 Eq. 409.

¹ *Williamson v. Tobey*, 86 Cal. 497 ; 25 P. 65.

² *Campbell v. Seaman*, 63 N. Y. (18 Sick.) 568 ; s. c. 20 Am. Rep. 567. See also *Beardmore v. Tredwell*, 31 L. T. N. S. 893 ; *Walter v. Selfe*, 4 De G. & S. 315 ; *Cavey v. Ledbitter*, 13 C. B. N. S. 470 ; *Hutchins v. Smith*, 63 Barb. (N. Y.) 251 ; *Pollock v. Lester*, 11 Hare, 266 ; *Weir's Appeal*, 74 Pa. St. 230 ; *Mulligan v. Elias*, 12 Abb. (N. Y.) N. S. 259. An injunction was granted before trial at law, to restrain the burning of bricks, not then already burning, in clamps on ground within sixty yards of the plaintiffs' houses, and from continuing, after a certain day, to burn such as were then burning, upon evidence of ill consequences suffered by some of the plaintiffs and their families from the noxious effects of the operation. *Pollock v. Lester*, 11 Hare, 266.

³ *Huckenstine's Appeal*, 70 Pa. St. 102 ; s. c. 10 Am. Rep. 668. See *Sellers v. Parvis, etc. Co.*, 30 Fed. Rep. 164 ; *Atty.-Gen. v. Cleaver*, 18 Ves. 219.

⁴ *Mulligan v. Elias*, 12 Abb. (N. Y.) N. S. 259. Compare *Wood v. McGrath*,

§ 431. **Noise.** — Noises which tend to disturb rest and quiet in the neighborhood may be restrained. Thus, where a railway company for the construction of their works erected a mortar-mill on part of their land, close to the place of business of the plaintiff, who complained of the injury and annoyance occasioned by the noise and vibration, it was held that the mortar-mill was not necessary for the construction of the line, and an injunction was granted accordingly.¹ To warrant an injunction against a noise as a nuisance it must be shown that the noise is such as to produce actual physical discomfort to a person of ordinary sensibilities, and is unreasonably and unnecessarily made.² And an injunction was refused, where sought against the operation of a furniture factory whose noise was alleged to be a nuisance as to plaintiff, living near by, the evidence being conflicting, but showing that the locality was noisy from other causes as well.³

§ 432. **Smoke.** — Smoke, unaccompanied with noise or with noxious vapors, although not injurious to health, may constitute a nuisance. The material question in all such cases is, whether the annoyance produced is such as materially to interfere with the ordinary comfort of human existence.⁴

(Pa. Sup.) 24 A. 682. As to nuisance by causing an offensive smell near dwelling, see *Knight v. Gardner*, 19 L. T. N. S. 673; from emptying sewerage of village upon a farm, *Dierks v. Commissioners of Highways Tp. Addison*, (Ill. Sup.) 31 N. E. 496.

¹ *Fenwick v. East London Railway Company*, L. R. 20 Eq. 544.

² *Pool v. Higginson*, 8 Daly (N. Y.), 113. See *Wende v. Socialer Turn Verein*, 66 Ill. App. 591. An injunction was granted to restrain the ringing of bells by a Roman Catholic community, although the same was done only on Sundays. *Sultan v. De Held*, 9 Eng. L. & Eq. 104. This case would now probably be considered of at least doubtful value.

³ *Powell v. Bentley & Gerwig Furniture Co.*, 34 W. Va. 804; 12 S. E. 1085.

⁴ *Crump v. Lambert*, L. R. 3 Eq. 409, affirmed on appeal, 17 L. T. N. S. 133. See *Salvon v. North Brancepeth Coal Co.*, L. R. 9 Ch. 705. Bill by plaintiff, seeking, on the ground of smoke nuisance, to stop a large commercial work, dismissed upon the facts, with costs. In deciding it the following subjects were discussed: The extent and character of the damage necessary to sustain a bill; the province of scientific evidence; the effect of the previous existence of similar nuisances; the circumstances under which the court will direct an issue or send an expert to report. In *Cleveland v. Citizens' G. L. Co.*, 5 C. E. Green, 201, Zabriskie, Chancellor, said: "Any business, however lawful, which causes annoyances that materially interfere with the ordinary comfort, physically, of human existence, is a nuisance that should be restrained; and smoke, noise, and bad

§ 433. **Lunatic Asylum.** — While insane asylums where persons bereft of reason are received and kept are necessary evils, yet it is obvious that such an institution may be conducted in such a way as to constitute it a nuisance in the most offensive sense of the term. An injunction was granted upon a bill which alleged that at a certain asylum the insane patients made indecent exposures of their persons, and uttered violent screams, that could be seen and heard from plaintiff's dwellings. The bill further alleged that the patients were allowed to go at large insufficiently attended, and that the fences which surrounded the asylum were insecure.¹

§ 434. **Disorderly Crowds.** — The collection of a crowd of noisy and disorderly people, to the annoyance of the neighborhood outside the grounds, in which entertainments with music and fireworks are being given for profit, is a nuisance for which the giver of the entertainment is liable to be enjoined, even though he has excluded all improper characters from the grounds, and the amusements in the grounds have been conducted in an orderly way, to the satisfaction of the police.² But the mere assembling of crowds of persons going to or coming from the performances at a circus, held in a covered building, is not necessarily a nuisance which a court of equity will restrain; and yet a perpetual injunction was granted to restrain the performances of a circus, on the ground that the performances caused an amount of noise such as to interfere with the ordinary peace and quiet of the occupiers of an adjacent dwelling-house.³

§ 435. **Keeping Bees.** — Where the evidence showed that the odors, even when not injurious to health, may render a dwelling so uncomfortable, as to drive from it any one not compelled by poverty to remain. Unpleasant odors, from the very constitution of our nature, render us uncomfortable, and when continued or repeated make life unendurable. To live comfortably is the chief and most reasonable object of men in acquiring property as the means of attaining it; and any interference with our neighbor in the comfortable enjoyment of life is a wrong which the law will redress. The only question is what amounts to that discomfort from which the law will protect. The discomforts must be physical, not such as depend upon taste or imagination. But whatever is offensive physically to the senses, and by such offensiveness makes life uncomfortable, is a nuisance; and it is not the less so because there may be persons whose habits and occupations have brought them to endure the same annoyances without discomfort."

¹ Rowbotham v. Jones, 47 N. J. Eq. 337; 20 A. 731.

² Walker v. Brewster, L. R. 5 Eq. 25.

³ Inchbald v. Robinson, L. R. 4 Ch. 388.

defendants had maintained, and were still maintaining, a large number of hives of bees, in an open lot immediately adjoining plaintiff's dwelling-house, and that at certain seasons they were a source of constant annoyance and discomfort to plaintiff and his family, greatly impairing the comfortable enjoyment of the property; also that the bees could be removed, without material injury, to a locality where neighbors would not be disturbed by them, it was held a proper case for a permanent injunction.¹

§ 436. *Sale of Intoxicating Liquors.* — The authorities are not uniform on the question whether, in the absence of statutory provisions making it so, the unlicensed sale of intoxicating liquors at a particular place is a nuisance; but the weight of authority is thought to be in the affirmative. But the question is of but little practical importance, since ample and effective statutory remedies are generally if not universally provided for abating as well as for punishing the offence. In a few states, however, the sale of intoxicating beverages and liquors is expressly made a nuisance which the courts are empowered to enjoin.² What facts would entitle an individual to an injunction in the absence of an express statute on the subject, it is impossible to state on authority. In one case it was held that an injunction could not be obtained by a tenant in common of premises to restrain a cotenant from keeping a liquor saloon upon them, unless the complainant showed that he suffered a special injury thereby not sustained by the public generally, and, also, that it was irreparable, and that a continuance was threatened and imminent.³ And where a statute provides that "all houses, buildings, and places of every description where

¹ *Olmstead v. Rich*, 6 N. Y. S. 826.

² See *McLain's Code*, Iowa, 2400; *State v. Schultz*, 79 Iowa, 478; 44 N. W. 713; *State v. Bowman*, 79 Iowa, 566; 44 N. W. 813. Under Laws N. H. 1887, c. 77, 1, 2, giving the supreme court jurisdiction in equity, on information or petition, to enjoin or abate as a common nuisance the use of any building for the sale of liquors, defendant is entitled to a trial by jury to ascertain the fact of the nuisance before it can be abated in equity. *State v. Currier*, (N. H.) 19 A. 1000. A pharmacist having a permit to sell intoxicating liquors for medical purposes, but who sells the same without requiring the applicant therefor to make the affidavit required by Gen. St. Kan., par. 2524, may be enjoined under par. 2533, declaring all places where intoxicating liquors are sold in violation of the preceding provisions to be nuisances which may be perpetually enjoined. *State v. Davis*, 44 Kan. 60; 24 P. 78.

³ *Oglesby Coal Co. v. Pasco*, 79 Ill. 164.

intoxicating liquors are sold or vended contrary to law shall be held, taken, and deemed to be common and public nuisances, and may be abated as such upon the conviction of the owner or keeper thereof, as hereinafter provided; and courts of equity shall have jurisdiction by injunction to restrain and abate any such nuisance upon bill filed by any citizen," it is held that a court of equity cannot restrain by injunction a party charged with selling intoxicating liquors contrary to law, or abate the house, building, or place where such intoxicating liquors are alleged to be sold contrary to law, until the owner or keeper of such house or place has been convicted of such unlawful selling at the place named in the bill.¹

§ 437. **Domestic Broils.** — A court of equity will, as far as possible, discourage a resort to its aid for the purpose of interfering with mere domestic broils. And where two families are occupying rooms in the same house and using in common the halls and stairways, a court of equity will not restrain the one from committing a nuisance against the other, except in a very clear and strong case.²

§ 438. **Constant Danger.** — Continual and imminent danger resulting from any cause constitutes a nuisance warranting an injunction where the maintenance of the cause may be avoided by reasonable care and vigilance on the part of persons chargeable with its maintenance.³ The keeping of places for the storage of gunpowder and other powerful explosives is the commonest instance of nuisances of this class.⁴ But many other

¹ *Hartley v. Henretta*, 35 W. Va. 222; 13 S. E. 375; Code W. Va. c. 32, § 18. An injunction to abate a liquor nuisance will not lie against persons whose property was occupied by trespassers, who erected a shanty thereon, and illegally sold intoxicating liquors, of all which they had no knowledge till service on them of the petition, when they abated the nuisance; nor is the property subject to a lien for costs and attorneys' fees in respect of the injunction. *State v. Lawler*, (Iowa) 52 N. W. 490.

² *Medford v. Levy*, 31 W. Va. 649; 8 S. E. 302.

³ *Hill v. Schneider*, 43 N. Y. S. 1, 13 App. Div. 299, 4 N. Y. Ann. Cas. 70, where relief was granted against blasting stone near plaintiff's premises.

⁴ For what circumstances are sufficient grounds for restraining the erection and maintenance of a powder magazine, to prevent an irreparable damage, not existing, see *Wier's Appeal*, 74 Pa. St. 280. A complaint for an injunction to restrain defendant from "shooting" a gas well on his land adjoining the land of plaintiff, and within two hundred feet of the residence of himself and family, with nitro-glycerine, which alleges that by shooting the well, and by the accumulation of a large amount of nitro-glycerine for that purpose, plaintiff's dwelling and the lives of himself and family will be endangered, if the

forms of constant danger and menace to life and property readily suggest themselves, such as large bodies of water in reservoirs or artificial lakes in elevated places. But where relief is sought merely on the ground of depreciation in the value of property attributable to the proximity of the danger, it is no abuse of discretion to refuse an injunction.¹

§ 439. **Railroad Cattle-yard.** — Where a railway company established a cattle-yard on its land near one of its stations, and the noise of the cattle and drovers were a nuisance to the plaintiffs who were occupiers of certain houses near the station, and they brought an action to restrain the company from continuing the nuisance, it was held that the plaintiffs were entitled to an injunction, for there was nothing in the act granting to the company its powers which by necessary implication authorized the creation of a nuisance on the lands.²

§ 440. **Miscellaneous — Dangerous Bridge; Rifle Range; Chinese Laundry.** — Many acts and things may be or become nuisances which it is unnecessary as well as impracticable to mention; a few additional instances of restraint may, however, be given by way of further illustration. The court granted an information and bill, upon the ground of public nuisance, to restrain the magistrates of a county from cutting the timbers supporting the roadway of a bridge;³ in another case to restrain the further use of a rifle-range for ball-practice, which had been certified by the Secretary of State for War, until it should have been rendered free from danger to the plaintiff, his family, and workmen;⁴ also to restrain and abate as a nuisance a Chinese laundry in the basement of a building.⁵ But an injunction against the sale of adulterated tea was refused where the evidence failed to show that it was dangerous to health.⁶

§ 441. **Nuisances resulting from Manner of using one's own Property.** — Where a party in the exercise of private rights over facts stated are true, shows a private nuisance, and alleges facts sufficient to warrant the granting of an injunction. *Tyner v. People's Gas Co.*, (Ind. Sup.) 81 N. E. 61.

¹ *Born v. Loflin & Rand Powder Co.*, 84 Ga. 217; 10 S. E. 738.

² *Truman v. London, Brighton, etc. Ry. Co.*, L. R. 29 Ch. Div. 89.

³ *Atty.-Gen. v. Forbes*, 2 My. & Cr. 123.

⁴ *Bannister v. Biggs*, 34 Beav. 287.

⁵ *Warwick v. Wah Lee*, (Pa.) 81 Leg. Int. 268. See *Richardson v. Oberholtzer*, (Pa.) 2 W. N. C. 882; *Hills v. Metzenroth*, (Mass.) 58 N. E. 890.

⁶ *Health Department v. Purdon*, 99 N. Y. 237; 1 N. E. 687.

his own property, on a portion of his own land, does acts which interfere with his neighbor's right to the enjoyment of pure air, and cause injury to the neighbor's property, and there are other situations on his land where he might do the same acts with equal or nearly equal benefit to himself, and without any or with considerably less inconvenience to his neighbor, the court will interfere by injunction.¹

¹ *Beardmore v. Tredwell*, 9 Jur. n. s. 272. See also *Harbison v. White*, 46 Conn. 106, holding that, under Conn. Gen. St. tit. 19, ch. 17, pt. 9, § 4, — allowing an injunction against malicious erection on one's own land of any structure to annoy an adjacent owner, etc., it is no defence that the injurious structure served to screen the respondent's premises from observation; also, that if stealthily erected and already completed, its continuance will be enjoined. See also *Calmelet v. Sichel*, (Neb.) 67 N. W. 467; *Finegan v. Eckerson*, 52 N. Y. S. 993; *Detroit & Erin Plank-Road Co. v. Macomb Circuit Judge*, (Mich.) 67 N. W. 531. Injunction will lie to prevent an adjoining landowner from building a privy within ten feet of plaintiff's well, and within thirteen feet of the dining-room and family bedroom, where she and her two daughters, one of whom is an invalid, eat and sleep. *Miley v. A'Hearn*, (Ky.) 18 S. W. 529.

CHAPTER VIII.

PERTAINING TO MORTGAGES.

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| <p>§ 442. Fraud and Mistake the Usual Grounds for Interference.</p> <p>443. Fraud in Execution of Mortgage.</p> <p>444. Bonds secured illegal.</p> <p>445. Dispute as to Amount of Indebtedness.</p> <p>446. Dispute as to Breach of Conditions.</p> <p>447. Mortgage satisfied.</p> <p>448. Indebtedness tendered.</p> <p>449. Violation of Subsequent Agreement.</p> <p>450. Want of Consideration — Incapacity of the Mortgagor.</p> <p>451. Usurious Contract.</p> <p>452. Deed absolute, intended as a Mortgage.</p> <p>453. Mistake in Description.</p> <p>454. Sale of Homestead.</p> <p>455. Fraudulent Abuse of Power of Sale.</p> | <p>§ 456. Equitable Grounds for Relief must be shown.</p> <p>457. Mortgage to Vendor—Prior Incumbrances — Action <i>quantum minoris</i>.</p> <p>458. Fraudulent Assignment of Satisfied Mortgage.</p> <p>459. Cloud on Title to Mortgaged Property.</p> <p>460. No Relief against Valid Tax Sale.</p> <p>461. Waste by Mortgagor.</p> <p>462. Interference of Mortgagor's Creditors.</p> <p>463. Disputes concerning Senior and Junior Mortgages — Ownership of Mortgage.</p> <p>464. Interference with Receiver.</p> <p>465. Interference with Chattel Mortgages.</p> <p>466. Allegations and Evidence.</p> <p>467. Relief on Terms and Conditions.</p> |
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§ 442. **Fraud and Mistake the Usual Grounds of Interference.** — The rights of parties under a mortgage being usually fixed and easily ascertainable by reference to its written terms, it is plain that except in cases of fraud or mistake in its inception or execution, or arising out of collateral matters connected with it, or fraudulent attempt to pervert and abuse the powers therein conferred, there is no room for equitable interference. The legal right of a mortgagee in a valid mortgage to have his security preserved until the maturity of the mortgage indebtedness, and afterwards to enforce his claim by strict foreclosure, or by exercising directly or through a designated trustee his power of sale conferred by the writing, will not be interfered with by a court of equity so long as no fraud, unfairness, or oppression is imputable to him, whatever the resulting loss and hardship to the mortgagor. The latter cannot invoke the aid of a court of equity in his behalf

upon other than equitable grounds.¹ Nor will one court of equity interfere with foreclosure proceedings in another court, though in violation of the terms of an agreement between the parties, where such other court has jurisdiction to grant all the relief to which the parties are entitled;² nor will an offer by the mortgagor to redeem, warrant interference in such case.³ The remedy of the party is by application to the court in which the foreclosure proceedings are had, and by appeal from its action if erroneous. A bill alleging that a sale is about to take place in a time of great financial depression and that property will be sacrificed, presents no case for interference.⁴ It might in such a time be a greater injury to keep the mortgagee out of the use of his money, than to sacrifice the property of the mortgagor.

§ 443. **Fraud in Execution of Mortgage.** — Fraud in the inception of a mortgage properly alleged will generally warrant a court of equity in restraining a sale under it until its validity can be tested.⁵ But the fraud must affect the immediate parties to the transaction and must be imputable to the mortgagee; and an injunction should not be granted on the ground of fraud in the procurement of title by the mortgagor where the mortgagee is a *bona fide* creditor without notice of such fraud.⁶ The facts constituting

¹ *Mott v. United States Trust Co.*, 19 Barb. (N. Y.) 568.

² *Buel v. San Francisco Savings Union*, 65 Cal. 292.

³ *Kilborn v. Robbins*, 8 Allen, (Mass.) 466.

⁴ *Muller's Adm'r v. Stone*, 84 Va. 834; 6 S. E. 228.

⁵ *Southampton Boat Co. v. Muntz*, 12 W. R. 830; *Bridgers v. Morris*, 90 N. C. 32; *Montgomery v. McEwen*, 9 Minn. 93; *Pritchard v. Sanderson*, 84 N. C. 299; *Struve v. Childs*, 63 Ala. 473; *Mosly v. Hodge*, 76 N. C. 387; *Baltimore Co. v. Robinson*, 55 Md. 410; *Kornegay v. Spicer*, 66 N. C. 95; *Foster v. Hughes*, 51 How. Pr. (N. Y.) 20; *Brown v. Cherry*, 56 Barb. (N. Y.) 635; *Robertson v. Norris*, 4 Jur. n. s. 155; *Ponton v. McAdoo*, 71 N. C. 101; *Welch v. Whittemore*, 25 Me. 86; *Pierson v. Ryerson*, 1 McCart. (N. J.) 181; *Walker v. Radford*, 67 Ala. 446; *Bennett v. Wright*, 28 N. Y. S. 453; 77 Hun, 331; *New England Mortg. Sec. Co. v. Powell*, (Ala.) 12 So. 55; *Platt v. McClune*, 8 Woodb. & M. (U. S.) 151; *Woodruff v. Halsey*, 8 Pick. (Mass.) 333.

⁶ *Putney v. Kohler*, 84 Ga. 528; 11 S. E. 127.

FRAUD OF CREDITORS. — Where complainant prayed an injunction against the sale of lands, under a trust-deed given to secure notes, because the trust creditors had offered to allow him to owe the notes if he would pay interest promptly and keep the property in order, and that he had made an outlay relying on such proposal, and where it appeared that after he had paid the interest on one note only, the trust creditors wrote him that they meant he should pay the whole interest, and that a senior trust-deed on the land was about to be foreclosed, the injunction should have been dissolved. *Bramlett v. Reily*, (Miss.) 3 So. 658.

the fraud must be clearly established in evidence; but this rule will be relaxed somewhat where the parties sustain a fiduciary relation, as where the mortgagee was at the time of taking the mortgage the solicitor of the mortgagor.¹

§ 444. **Bonds secured illegal.** — But the *bona fides* of the holders of illegal bonds was held immaterial as against a bill clearly setting forth such illegality, where it appeared that property mortgaged had also passed into the hands of innocent purchasers for value, and the trustees for the bondholders answered for them, merely setting up a waiver by the mortgagor of the illegality on information and belief, and in like manner denying the facts; and an injunction was accordingly granted.²

§ 445. **Dispute as to Amount of Indebtedness.** — A sale under the power contained in a mortgage deed may be enjoined until it can be determined on hearing what is the real amount due, there being a controversy on this point.³ In such cases the proceedings for the foreclosure will be restrained until the equities between the parties can be adjusted, and the amount actually due ascertained.⁴ On the same principle a decree on a mortgage foreclosure for the face of a bond with interest, when the bond is in double the sum owed, entitles the mortgagor to an injunction against sale under such a decree.⁵ But the execution of a power of sale in a mortgage pending a suit to settle partnership accounts between the mortgagor and mortgagee not involved in the mortgage, will not be enjoined without an averment of the insolvency of the mortgagee or other special circumstances, there not appearing any danger of irreparable injury by a sale.⁶

§ 446. **Dispute as to Breach of Conditions.** — A *bona fide* dispute as to whether a condition, upon breach of which the debt

¹ *MacLeod v. Jones*, (No. 1) 24 L. R. Ch. D. 289; s. c. 49 L. T. 321; 32 W. R. 43; 53 L. J. Ch. 145.

² *Carpenter v. Talbot*, 33 F. 537.

³ *Bridgers v. Morris*, 90 N. C. 32. In such case under the North Carolina practice, a bond of indemnity may be required. *Id.*

⁴ *Kornegay v. Spicer*, 76 N. C. 95; *McCorkel v. Brem*, 76 N. C. 407; *Waite v. Ballou*, 19 Kan. 601; *Purnell v. Vaughan*, 77 N. C. 268; *Hooker v. Austin*, 41 Miss. 717; *Van Bergen v. Demarest*, 4 Johns. (N. Y.) Ch. 37; *Craft v. Bullard*, 1 Sm. & M. (Miss.) Ch. 366; *Cole v. Savage*, Clark (N. Y.) Ch. 361; *Goodrich v. Foster*, 131 Mass. 217; *Tillery v. Wren*, 86 N. C. 217.

⁵ *Scriven v. Hursh*, 39 Mich. 98.

⁶ *Glover v. Hembree*, 82 Ala. 324; *Muller's Adm'r v. Stone*, 84 Va. 834.

secured by the mortgage is to become due has in fact been violated, will warrant the granting of an injunction to restrain the foreclosure sale until a judicial determination of the issue thus presented, it being contested by opposing affidavits.¹

§ 447. **Mortgage satisfied.** — A bill alleging that the indebtedness for which a mortgage about to be foreclosed under a power of sale was given, has been paid and satisfied, presents a clear case for an injunction upon well-known principles.² But where the fact of overpayment was disputed by the answer, thus presenting an issue necessary to be tried and determined in a law court, nothing further appearing, an injunction restraining the sale under the mortgage was held improper.³ If, however, in such a case the insolvency of the mortgagee or other special circumstances are alleged, at least a temporary injunction should be granted, notwithstanding the dispute; and the doctrine above stated is opposed to that of another case in which, upon evidence being introduced that before the property was advertised for sale a settlement was had between the parties, by which it was ascertained that the mortgagor had performed services for the mortgagee equal in value to the mortgage debt, a decree was entered perpetuating a temporary injunction previously granted.⁴ And a motion to dissolve a temporary injunction against a sale under a mortgage upon an answer which merely denied payment was held properly overruled, where plaintiff prayed for an accounting, and for leave to redeem.⁵ Relief will also be granted in a proper case in favor of a junior mortgagee to restrain a sale under a satisfied prior incumbrance.⁶

§ 448. **Indebtedness tendered.** — On like principles, a valid tender of the amount actually due or of a sum sufficient to cover

¹ *O'Brien v. Oswald*, 45 Minn. 59; 47 N. W. 316.

² *Davis v. Lassiter*, (N. C.) 16 S. E. 899. See also *Campbell v. Ernest*, 64 Hun, 188.

³ *McCulla v. Beadleston*, (R. I.) 20 A. 11.

⁴ *Frazier v. Keller*, 71 Md. 58; 20 A. 134. Compare *Yarborough v. Miller*, 84 Ga. 546; 11 S. E. 450.

⁵ *Whitley v. Dunham Lumber Co.*, 89 Ala. 493; 7 So. 810. When a defendant in executory proceedings for the sale of mortgaged property sets up a plea of compensation, and makes the requisite affidavit, he is entitled to a preliminary injunction without bond. *Newmann v. Frevin*, 42 La. An. 720; 7 So. 799.

⁶ *Brigham v. White*, 44 Iowa, 677; *Meysenberg v. Schlieker*, 46 Mo. 209; *Hughes v. Worley*, 1 Bibb (Ky.), 200; *Bloomington v. Barnard*, 7 Hun (N. Y.), 460; *Drings v. Parshall*, 7 Hun (N. Y.), 522.

any amount likely to be found due upon an accounting, entitles a mortgagor to an injunction against a mortgagee who, notwithstanding such tender, is proceeding to foreclose under his mortgage and sell for a greater sum.¹ And where a bill in equity to redeem and enjoin sale of land under mortgage alleged that, after tender of the full amount due under the mortgage had been twice made, defendant commenced foreclosure proceedings, and that, after answers had been filed, he dismissed the bill without prejudice, and advertised the land for sale under the power of sale in the mortgage, his purpose being to coerce the payment of another claim not connected with the mortgage, it was held that these allegations, not having been met by answer, justified the retention of the injunction.² So on a bill containing an averment of payment, but offering to pay any amount which upon an accounting might be found still due, and praying an injunction and to be allowed to redeem, it was held that a motion to dismiss for want of equity was properly denied.³ So a release by the terms of which the right to foreclose at the time fixed in the mortgage is taken away will entitle the mortgagor to an injunction against a foreclosure.⁴

§ 449. **Violation of Subsequent Agreement.** — Equity will interfere at suit of a mortgagor with whom the mortgagee has made a subsequent agreement suspending the right to foreclose, and extending the time for payment until default in performing the new contract.⁵ But where defendant held a deed of trust on the land of a party who sold to plaintiff, and the defendant took plaintiff's bond for less than his debt, which bond was accepted by defendant to be, when paid, in full discharge of his debt, it was held that, upon the title proving defective and plaintiff having to relieve it of an incumbrance, plaintiff could not, in the absence of any representations by the defendant as to the title, enjoin the enforcement of defendant's deed of trust.⁶

§ 450. **Want of Consideration — Incapacity of Mortgagor.** — A sale under a trust-deed may be enjoined on the ground that the

¹ *McCalley v. Otey*, 90 Ala. 302; 8 So. 157; *Whitley v. Dunham Lumber Co.*, 89 Ala. 493; 7 So. 810.

² *McCalley v. Otey*, 90 Ala. 302; 8 So. 157.

³ *Whitley v. Dunham Lumber Co.*, 89 Ala. 493; 7 So. 810.

⁴ *Hubbard v. Jasinski*, 46 Ill. 160.

⁵ *Penouilh v. Abraham*, 42 La. An. 326; 7 So. 533. See also *Barnum v. Bobb*, 68 Mo. 619.

⁶ *Stimpson v. Bishop*, 82 Va. 190.

note secured by the deed was without consideration.¹ And it was held that a mortgagor could maintain an injunction on this ground, notwithstanding the fact that the mortgage was executed for the purpose of hindering and delaying creditors.² Like reason exists for enjoining the foreclosure of a mortgage made in the name of one not of mental or legal capacity to contract.³

§ 451. **Usurious Contract.** — Unless the statutes of the state where the proceedings are instituted declare usurious contracts void, equity will not enjoin a sale, under a power of sale, and application of the proceeds to the extent of the amount justly due;⁴ but where the rate of interest provided for in the mortgage and note after the note becomes due is usurious, or by way of penalty, the court will if necessary enjoin the sale until the amount actually due can be ascertained.⁵ At all events the mortgagor will be required to tender the amount legally due.⁶ It is otherwise where the contract is void by reason of the usury.⁷ Where by statute a creditor is not allowed to make it a condition of a loan that he shall receive a compensation for his services in procuring the money; and if the amount of such compensation is included in the security given for the loan, the court will, on the debtor's paying into court the sum reported to be due by a master, after deducting the sum charged for such services, grant an injunction to stay proceedings upon a mortgage, by which the loan is secured.⁸

¹ *Ryan v. Gilliam*, 75 Mo. 132; *Brooks v. Owen*, (Mo. Sup.) 19 S. W. 723.

² *Devlin v. Quigg*, (Minn.) 47 N. W. 258.

³ *French v. Snell*, 29 N. J. Eq. 95; *Strom v. American Freehold Land Mortg. Co. of London*, (S. C.) 20 S. E. 16. See also *Barrick v. Horner*, 78 Md. 253; *Parsons v. Hunkins*, 87 Wis. 115; *Harrell v. Refrigerator Co.*, 92 Ga. 443; *McCalley v. Otey*, 99 Ala. 584.

⁴ *Tooker v. Newman*, 75 Ill. 215.

⁵ *Culbertson v. Lennon*, 4 Minn. 51; *Purnell v. Vaughan*, 77 N. C. 268; *Bidwell v. Whitney*, 4 Minn. 76; *Hooker v. Austin*, 41 Miss. 717. See also *Waite v. Ballou*, 19 Kan. 601; *Meroney v. Atlanta Nat. Bldg. & Loan Ass'n*, (N. C.) 17 S. E. 637.

⁶ *Cassady v. Bosler*, 11 Iowa, 242; *Gantt v. Grindall*, 49 Md. 310; *Walker v. Cockey*, 38 Md. 75; *Powell v. Hopkins*, 38 Md. 1; *Hill v. Reifsnider*, 39 Md. 429.

⁷ *Burnett v. Denniston*, 5 Johns. (N. Y.) Ch. 35; *Hyland v. Stafford*, 10 Barb. (N. Y.) 558.

⁸ *Hine v. Hay*, 1 Johns. (N. Y.) Ch. 6. If a mortgage is usurious, and is a cloud upon the title of the mortgagor, he has a right, under N. Y. act of 1837, to come into the court of chancery for the purpose of having the mortgage cancelled, but that will not entitle him to an injunction to prevent the mort-

§ 452. **Deed absolute, intended as a Mortgage.** — An injunction should be granted until a hearing can be had to restrain the defendant from selling real estate which the plaintiff's bill alleges was conveyed to the defendant by a deed, absolute on its face, but intended only as a mortgage, and which was put in its present form through the fraud and oppression of the defendant.¹

§ 453. **Mistake in Description.** — Upon well-established principles any party who will be seriously injured, either by a cloud being cast upon his title or otherwise, by a foreclosure and sale under a mortgage in which there is a mistake by which more land is included than was intended, may enjoin such sale unless the mortgagee is willing to limit the sale to the land intended to be covered by his mortgage. On the same principle, where through mistake in the description the mortgage does not cover the entire premises intended to be conveyed, a purchaser at the foreclosure sale with the understanding that his purchase includes all the property intended to be covered by the mortgage, is entitled to an injunction restraining the mortgagor, or one claiming under him, from proceeding with an action in ejectment for that portion of the premises not covered by the description.²

§ 454. **Sale of Homestead.** — If a mortgage contain a power of sale, the homestead right in the premises not being released, a court of chancery will interpose by injunction to restrain the mortgagee from making sale of the premises intended and used as a homestead under the power contained in the mortgage.³ And where a deserted wife, who had obtained a judgment against

gagee from trying the question of usury before a jury, in a suit at law upon the bond, unless a discovery is necessary or some other obstacle exists to the making of the defence at law. *Hartson v. Davenport*, 2 Barb. (N. Y.) Ch. 77.

¹ *Presler v. Barringer*, 1 Wins. (N. C.) Eq. (part 2) 5. See also *Mallory v. Cowart*, (Ga.) 16 S. E. 658.

² *Waldron v. Leston*, 2 McCart. (N. J.) 126; *Ponton v. McAdoo*, 71 N. C. 101; *Smith v. Mechanics' Assoc.*, 73 N. C. 372. But where a mortgagor alleged on oath that the deed of the land to him from the mortgagee (his vendor) did not convey a legal title, by reason of a mistake in the deed executed to said mortgagee by his grantor, and other facts, which he (said mortgagor) had not discovered until after the commencement of the action; but it appeared that he had taken no steps to perfect his title, — it was held, that proceedings by an assignee of the mortgage to foreclose would not be enjoined. *Marr v. Howland*, 20 Wis. 282.

³ *Boyd v. Cudderback*, 31 Ill. 113.

her husband, levies on the homestead subject to prior mortgages, which are foreclosed, and the property bought in by the wife, equity will entertain a bill to enjoin a sale under, and compel satisfaction of, other mortgages paid, but not satisfied of record, which have been obtained through collusion with the husband, and are attempted to be enforced under the former decree.¹

§ 455. **Fraudulent Abuse of Power of Sale.** — Courts of equity are often resorted to for relief against fraudulent abuses by mortgagees, or trustees acting for them, of powers of sale conferred in mortgages. The power is conferred alone by the contract between the parties, which is usually controlled and modified somewhat by statutory provisions. So long as the mortgagee conforms to its terms as so modified, and exercises his right of foreclosure in the manner pointed out, he will not be interfered with, although he act contrary to the desire and interest of the mortgagor, provided there was no fraud or illegality in obtaining the mortgage containing the power.² But the powers of sale in mortgages are conferred for the purpose of effecting speedy payment of the mortgage debt; and while courts recognize their appropriate use, they regard them with a degree of jealousy, and will discountenance and enjoin all abuses of the powers conferred by them. When an attempt is made to employ them for purposes of oppression or to obtain unfair advantages over mortgagees, an injunction is the appropriate remedy.³ A sale

¹ *Eaton v. Eaton*, 68 Mich. 158; 36 N. W. 50.

² *McCormick v. Hartley*, 107 Ind. 248; *Bridgers v. Morris*, 90 N. C. 82; *Welch v. Whittemore*, 25 Me. 86; *Gooch v. Vaughan*, 92 N. C. 610; *Brown v. Cherry*, 56 Barb. (N. Y.) 635; s. c. 38 How. (N. Y.) Pr. 352; *Carpenter v. Black Hawk, etc. Co.*, 65 N. Y. 43; *Platt v. McClure*, 3 Woodb. & M. (U. S.) 151; *Armstrong v. Sandford*, 4 Minn. 49; *Walker v. Radford*, 67 Ala. 446; *Pierson v. Ryerson*, 1 McCart. (N. J.) 181; *Pritchard v. Sanderson*, 84 N. C. 299; *Woodruff v. Halsey*, 8 Pick. (Mass.) 333. If a mortgagee exercises his power of sale *bona fide* for the purpose of realizing his debt and without collusion with the purchaser, the court will not interfere even though the sale be very disadvantageous, unless the price is so low as in itself to be evidence of fraud. *Warner v. Jacob*, L. R. 20 Ch. Div. 220.

SALE BY JUNIOR MORTGAGEE. — The holder of a senior lien of land is not entitled to an injunction to restrain the sale for the satisfaction of a junior lien, — not even where the senior lien has been cancelled of record by a mistake to which the junior lien-holder was not party, and for which he was in no way responsible. *Weidner v. Thompson*, 66 Iowa, 283.

³ *Gooch v. Vaughan*, 92 N. C. 610; *Walker v. Radford*, 67 Ala. 446; *McCalley v. Otey*, (Ala.) 12 So. 406; *Ades v. Levi*, (Ind. Sup.) 37 N. E. 388; *Kornegay v. Spicer*, 66 N. C. 95; *Welch v. Whittemore*, 25 Me. 86.

under the mortgage may be restrained, temporarily at least, on equitable grounds, such as that the debt is being contested ; that the mortgagor has tendered payment ; that the mortgagee has not given reasonable notice to the mortgagor that he will sell, and the like.¹

§ 456. **Equitable Grounds for Relief must be shown.** — It is no ground for enjoining the sale of real estate under the provisions of a deed of trust, that money is scarce, and that, in consequence of the large cash payment required, a sale at that time will result in great if not irreparable loss to the owner of the property.² Nor will a mortgage sale be enjoined because that by reason of want of legal authority in defendant to sell, the sale will be a nullity ;³ nor will an injunction be granted upon allegations that the mortgaged property greatly exceeds the amount of the mortgage debt, and that the mortgagee threatens to sell, unless a second mortgage is paid, and thereby exercises an undue advantage, and oppresses complainant.⁴ And on the same principle that a court of equity will not invade the jurisdiction of another court having cognizance of a matter, an injunction should not be granted to restrain a mortgagee from selling the mortgaged premises, for cash, under a power in the mortgage authorizing him to sell, on default made, but omitting to prescribe the terms of sale. The mortgagor, if damnified by such sale, has ample remedy by making objections to its ratification.⁵ And the sale of land under a trust deed given to indemnify a surety will not be enjoined where the debt is past due, and the parties have agreed that the trustee

¹ *Capehart v. Biggs*, 77 N. C. 261; *Purnell v. Vaughan*, Id. 268; *Struve v. Childs*, 63 Ala. 473. Under Comp. Laws S. D. 5411, which provides that application may be made to the district judge for an order enjoining a foreclosure by advertisement, and directing that all further proceedings be had in the district court, the application by the mortgagor was designed to be so far *ex parte* as not to authorize or allow resisting affidavits. *Commercial National Bank v. Smith*, (S. D.) 44 N. W. 1024.

² *Muller v. Bayly*, 21 Grat. (Va.) 521.

³ *Chapman v. Younger*, 32 S. C. 295; 10 S. E. 1077.

⁴ *McCulla v. Beadleston*, (R. I.) 20 A. 11. In a bill for an injunction against a sale of real estate under a mortgage containing a power of sale, a mere general allegation that the sale would seriously prejudice the complainant or embarrass and injure him, is a conclusion, and shows no ground for relief. *Montgomery v. McEwen*, 9 Minn. 103; *Foster v. Reynolds*, 38 Mo. 553. See also *Street v. Rider*, 14 Iowa, 306; *Holland v. Citizens' Sav. Bank*, 16 R. I. 734; 19 A. 654; *Gold Amalgamating Co. v. Ore-Dressing Co.*, 73 N. C. 468.

⁵ *Powell v. Hopkins*, 38 Md. 1.

may advertise in time to sell by a certain day, though the surety has not yet paid the debt.¹ Nor will the sale be enjoined pending final hearing where the proceedings being regular on their face the answer denies all the equities of the bill.²

§ 457. **Mortgage to Vendor — Prior Incumbrances — Action *quantum minoris*.** — Where lands are sold and a warranty deed given, and the purchaser subsequently discovers that incumbrances exist dating prior to the conveyance, he may enjoin the foreclosure of a mortgage given for the balance of the purchase-money until the amount of the prior incumbrances are adjusted and paid. And where it appeared upon a foreclosure suit on a mortgage to secure purchase-money, that at the time of purchase there were liens on the premises sold, against the mortgagee, exceeding in amount the purchase-money sued for, it was held, the mortgagor was entitled to an injunction against the collection of the mortgage debt, until the mortgagor should reduce the incumbrance to a sum not exceeding that of the purchase-money due.³ And where, previous to obtaining an order of seizure and sale for the price secured by mortgage on the property sold, the vendee had commenced an action of *quantum minoris* against the vendor, which, if successful, would absorb the amount of the executory demand, it was held that an injunction against the order of seizure and sale should be perpetuated without prejudice to the eventual rights of the defendant in injunction.⁴

§ 458. **Fraudulent Assignment of Satisfied Mortgage.** — Where rights and equities exist between the immediate parties to a mortgage in favor of the mortgagee, not appearing upon its face, the mortgagor will be entitled to an injunction to restrain assignment of the same, whereby his defences would become unavailable as against an assignee without notice of the same.⁵ And where

¹ *Brower v. Buxton*, 101 N. C. 419; 8 S. E. 116. An action brought against the holder of a mortgage, to declare void and cancel the mortgage, is no ground for an injunction restraining the prosecution of a subsequent foreclosure suit brought by the mortgagee upon the mortgage. *Tarrant v. Quackenbos*, 10 How. (N. Y.) Pr. 244.

² *Weems v. Roberts*, (Ala.) 11 So. 434; *Trexler v. Duby*, (Pa. Com. Pl.) 16 Pa. Co. Ct. R. 141.

³ *Arnold v. Curl*, 18 Ind. 339. See *Hazelhurst v. Sea Isle City Hotel Co.*, (N. J. Ch.) 25 A. 201.

⁴ *Walker v. Cucullu*, 15 La. An. 689.

⁵ *Infra*, § 459. See *Haescig v. Brown*, 34 Mich. 508; *Conkey v. Dike*, 17 Minn. 457.

plaintiff's husband used her money in paying defendants for goods purchased, and assigned to them a mortgage in his name, but given for her money, loaned by him as collateral for other goods for which he owed, and also mortgaged a lot for which her money was paid, but to which he held legal title, defendants having notice of such ownership, it was held that while at law she might recover the money already paid, yet equity would relieve as to the mortgages by injunction on the ground of preventing a multiplicity of suits.¹

§ 459. **Cloud on Title to Mortgaged Property.** — Equity is adverse, as a rule, to interfering with proceedings to enforce judgments where the ground alleged for an injunction is that the sale under execution and deed thereunder, unless restrained, will cast a cloud upon complainant's title. But, as has been elsewhere stated,² where the sale and conveyance of the land of one not a party would actually have that effect, relief against it will be granted, as well in favor of the interests of the parties to a mortgage as in other cases. Thus where on the foreclosure of a mortgage an execution had been issued, which by mistake directed the sale of land not included in complainant's mortgage, or described in his bill, and by virtue of which the sheriff had sold such land, an injunction was issued to restrain the sheriff from delivering the deed.³ And one who has been in adverse possession as against the trust-deed for the period of limitation may enjoin a sale under the deed, as such sale would cast a cloud on his title.⁴ But where a cotenant redeems from a foreclosure by payment of the entire debt, and the title of such redemptioner, and his certificate of redemption of record, clearly show his rights and superior equity, an injunction restraining the foreclosure of a second mortgage, made by his cotenant after such redemption, is unnecessary for his protection.⁵

¹ *Mayer v. Coley*, 80 Ga. 207; 7 S. E. 164.

² *Supra*, §§ 197, 198.

³ *Corles v. Lashley*, 15 N. J. Eq. (2 McCart.) 116. See also *Harrell v. Americus Refrigerator Co.*, (Ga.) 17 S. E. 623; *McCulla v. Beadleston*, 17 R. I. 20.

⁴ *Gardner v. Terry*, 99 Mo. 523; 12 S. W. 888.

⁵ *Buettel v. Harmount*, 46 Minn. 481; 49 N. W. 250. Where lands are mortgaged, subject to the lien of a judgment, the mortgagee cannot maintain a bill in equity to enjoin the levy of an execution under such judgment upon said lands, if the bill does not state that the mortgagor, at the time of the issue and levy, had the legal title to the real estate. *Massie v. Wilson*, 16 Iowa, 390.

§ 460. **No Relief against Valid Tax Sale.** — A mortgagee is not entitled to an injunction against a *bona fide* purchaser at a valid tax sale of part of the mortgaged premises, to prevent his taking out a deed to the land sold, especially where the remaining land upon which his mortgage is a lien is ample to secure his debt. In such case if the tax sale and the proceedings are regular, and defendant's title as purchaser has been established by judgment in the appellate court, an injunction will not be granted.¹

§ 461. **Waste by Mortgagor.** — Where it is shown that a mortgagor in possession is committing or is about to commit waste upon the mortgaged premises so as to impair the security, and that the mortgagor is insolvent, the mortgagee will be entitled to an injunction to restrain the further continuance of waste, or its commission if threatened.² Thus a mortgagor who is insolvent will be restrained from cutting timber from the mortgaged premises when the removal of the timber would render the security inadequate.³

§ 462. **Interference of Mortgagor's Creditors.** — Mortgagees will sometimes be entitled to equitable protection by injunction against interference with their rights under the mortgage by the creditors of the mortgagor; as where a trustee put in possession under a petition by the mortgagor for liquidation began cutting and removing the growing crops.⁴ And where a surety received a mortgage of slaves from his principal to indemnify him, and afterwards they were levied on for the debt of the principal, while it was uncertain whether the surety would sustain a loss by reason of his suretyship, on a bill by the surety for an injunction to restrain the sale, it was held, that equity had jurisdiction to grant relief and to protect the surety by injunction.⁵ So where, on foreclosure of a mortgage, it was decided that certain property

¹ Cook v. Miller, 26 Ill. App. 421.

² Robinson v. Russell, 24 Cal. 467; Ensign v. Colburn, 11 Paige (N. Y.), 503; Taylor v. Collins, 51 Wis. 123; Nelson v. Pinnegar, 30 Ill. 478; Salmon v. Clagett, 3 Bland (Md.), 126; Betz v. Verner, (N. J.) 19 A. 206; 46 N. J. Eq. 256; Fairbank v. Cudworth, 83 Wis. 358; Murdock's Case, 2 Bland (Md.), 461; Brady v. Waldon, 2 Johns. (N. Y.) Ch. 148; Cooper v. Davis, 15 Conn. 561; *supra*, § 266.

³ Atkinson v. Hewitt, 51 Wis. 275; Bunker v. Locke, 15 Wis. 702; Gray v. Baldwin, 8 Blackf. (Ind.) 164; Brown v. Stewart, 1 Md. Ch. 87; Maryland v. Northern, etc., R. Co., 18 Md. 193.

⁴ Bagnall v. Villar, L. R. 12 Ch. Div. 812.

Marshall v. Colvert, 5 Leigh (Va.), 146.

on which execution had been levied was not covered by the mortgage, from which decision the mortgagee appealed, it was held, that, pending the appeal, he was entitled to an injunction to restrain the execution creditor from disposing of the property.¹ But where complainant, as holder of bonds secured by mortgage on a tract of land, applied for a preliminary injunction restraining defendants from committing any injury to said land, nothing appearing to show that defendants were interfering with the land except by claiming title to it, and the affidavits disclosed a conflict of testimony, it was held, that a preliminary injunction should be denied.²

§ 463. **Disputes concerning Senior and Junior Mortgages — Ownership of Mortgage.** — Controversies concerning the respective rights and equities of senior and junior mortgagees and between them and mortgagors sometimes justify intervention by injunction. But equity will not interfere unless equitable grounds are shown, and it appears that there is no legal remedy available to the party for the act complained of.³ There may also be such a case of disputed right of ownership of a mortgage between two parties, each claiming to be the person intended to be secured, as will warrant equitable interference by injunction.⁴

§ 464. **Interference with Receiver — Rent pending Foreclosure Proceedings.** — In the absence of statutes limiting the jurisdic-

¹ Penn. Mut. Life Ins. Co. v. Semple, 38 N. J. Eq. 314. Where it appears doubtful from affidavits whether goods on which it is attempted to levy a mortgage *fi. fa.* are the goods covered by the mortgage, the levy should be enjoined until the final hearing. Lanier v. Adams, 72 Ga. 145.

² Marshall v. Turnbull, 82 F. 124. A. purchased land of B. and gave his note for the price payable in instalments, to meet payments to be made on a mortgage upon the land. A. failed to pay the note, and the mortgage was foreclosed, and A. became the purchaser of the land at the foreclosure sale; and B. recovered judgment against A. on his note. *Held*, that A. was not entitled to his relief in equity against the judgment. Clark v. Condit, 13 Mo. 222.

³ Myers v. Pierce, 86 Ga. 786; 12 S. E. 978. In this case a party had executed to plaintiff a mortgage on his undivided interest in the land of his deceased father, and then assigned his interest to his sister. Accordingly two shares of the land, numbered lots 3 and 7, were received by her, and she executed a mortgage on both to defendant. It was admitted that either one was sufficient to pay defendant's debt. *Held*, that plaintiff could not enjoin the foreclosure of defendant's mortgage in order that the mortgagor might elect which lot she would retain as her own, and which surrender to plaintiff as the mortgagee of his grantor.

⁴ Rappanier v. Bannon, (Md.) 13 A. 627.

tion it is well established that where the mortgaged premises are shown to be inadequate, as security for the indebtedness, and the mortgagor is shown to be insolvent, a court of equity is warranted in appointing a receiver over the mortgaged property, and enjoining the mortgagor from any interference with such receiver of the property.¹ And where a suit is pending between mortgagor and mortgagee, as to which of them is entitled to rent of mortgaged premises, the tenant may have an injunction against its collection pending the suit, and a receiver may be appointed to hold it.²

§ 465. **Interference with Chattel Mortgages.** — There is no positive rule to the effect that courts of equity will refuse to interfere to preserve by injunction the rights and interests of parties under mortgages of personal property; and yet except under rare circumstances the remedies at law will be deemed adequate to afford redress, and equitable jurisdiction will be declined.³ Accordingly it is held that an injunction should not issue at the instance of a mortgagee of chattels to restrain their sale under another mortgage which does not embrace them, the remedy at law being deemed adequate,⁴ and that the insolvency of the per-

¹ *Ruggles v. Southern Minn. R. Co.*, 5 Chicago Leg. N. 110; *Seaver v. Durant*, 39 Vt. 103; *Brown v. Chase*, Walk. (Mich.) 43; *Hill v. Hill*, 59 Vt. 153; *Keep v. Michigan Lake Shore R. Co.*, 6 Chicago Leg. N. 101; *Lea Ins. Co. v. Stebbins*, 8 Paige (N. Y.), 565; *Hill v. Robertson*, 24 Miss. 368; *Hyman v. Kelly*, 1 Nev. 179; *Quincy v. Cheeseman*, 4 Sandf. (N. Y.) Ch. 405.

² *McCoy v. McMurtrie*, 12 Phila. (Pa.) 180.

³ *Carpenter v. Talbot*, 33 F. 537; *Baird v. Warwick Machine Co.*, 40 F. 386; *Normandin v. Mackey*, 38 Minn. 417; 37 N. W. 954; *Warner v. Pain*, 3 Barb. (N. Y.) Ch. 630; *Lawson v. Barton*, (Ark.) 7 S. W. 387. The rule that equity will not enforce a hard and unconscionable contract does not authorize an injunction against the seizure of mortgaged chattels by the mortgagee, under a provision authorizing him to take possession whenever he deemed himself insecure, since the mortgagee is not seeking affirmative relief; nor can the provision of the mortgage be termed hard and unconscionable, as the execution of a chattel mortgage transfers the legal title, which carries with it the right of possession, in the absence of an agreement, express or implied, to the contrary. *Cline v. Libby*, 46 Wis. 123; 49 N. W. 832. A statute which allows creditors of the mortgagor of personal property to pay or tender to the mortgagee, or deposit with the clerk, the amount of the mortgage debt, and thereupon seize the property on execution or attachment, but provides that the right of any creditor to contest the validity of the mortgage shall not be affected, by implication prohibits an injunction in such case; as before the creditor can contest the mortgage at law he must acquire an apparent lien on the property. *Stratton v. Packer*, (N. J.) 14 A. 587.

⁴ *Rankin v. Rankin*, 67 Iowa, 322; *La Mothe v. Fink*, 8 Biss. C. Ct. 493.

sons taking the property does not alter the rule, the character of the property being decisive to that extent.¹ But this rule, or, more properly speaking, this practice of refusing relief in cases involving chattel mortgages is frequently relaxed in order to prevent gross fraud and serious loss; and a court will interfere to prevent a creditor from selling the equity of redemption of the mortgagor in chattels when, by such sale if permitted, the rights of the mortgagee will be greatly impaired.² A court of equity exercised jurisdiction, at the instance of a purchaser at a mortgage foreclosure sale of land on which a canning factory was situated, to restrain a party to whom the mortgagor of the land had executed a subsequent chattel mortgage, from selling the machinery on the premises covered by the mortgage during the canning season, because the sale would destroy the business conducted therein, as the owner would have no adequate remedy at law.³

§ 466. **Allegations and Evidence.** — The bill must contain a statement of the facts which it is claimed show fraud or illegality in a mortgage, or an abuse of power whereby the sale would work gross injustice or be against good conscience.⁴ And while clear and satisfactory evidence will be required at the final hearing,⁵ yet, even though the facts be in dispute, a temporary injunction should be granted in a case otherwise proper, in the first instance. Thus, where the facts on which a mortgage debtor claimed the right to set off claims against the mortgagee were

¹ *Stratton v. Packer*, (N. J.) 14 A. 587.

² *Smithurst v. Edmunds*, 14 N. J. Eq. (1 McCart.) 408.

³ *Dudley v. Hurst*, 67 Md. 44; 8 A. 901; see also *Baltimore City Brick Co. v. Robison*, 55 Md. 410. In Colorado, in an action in the county court to foreclose a chattel mortgage, the court has jurisdiction to grant an injunction to restrain defendant from disposing of the mortgaged property. *Bennett v. Reef*, 16 Col. 431; 27 P. 252.

⁴ *Vaughan v. Marable*, 64 Ala. 60; *Conkey v. Dike*, 17 Minn. 457; *Foster v. Reynolds*, 38 Mo. 553; *Merest v. Murray*, 14 L. T. N. S. 321; *Montgomery v. McEwen*, 9 Minn. 103; *Moss v. Pittingill*, 3 Minn. 145; *Street v. Rider*, 14 Iowa, 506; *Armstrong v. Sandford*, 7 Minn. 49. See also *Evans v. Fields*, (Miss.) 11 So. 224.

⁵ *Van Meter v. Hamilton*, 96 Mo. 654; 10 S. W. 71. On the bill by a mortgagee to restrain a purchaser of the premises at tax-sale from taking out a deed, on the ground of irreparable injury to him by destruction of his security, it is competent to show what additional security he holds for the debt. *Cook v. Miller*, 26 Ill. App. 421.

in dispute, a foreclosure was held properly enjoined until such facts could be inquired into.¹

§ 467. **Relief on Terms and Conditions.**—Where the ground for relief alleged is that the amount claimed by the mortgagee for which he is about to foreclose is in excess of what is actually due him, the court will require the complainant to tender the amount admitted in his bill to be actually due.² But the entire sum claimed need not be paid into court as a condition to obtaining relief by injunction, where it is apparent to the court that by the terms of the mortgage deed there is due a less sum.³ The rule applies where several parcels of land are owned by different parties, liable to contribute ratably to the payment of an incumbrance upon all of them, and an owner of one parcel is not entitled to enjoin the sale of his parcel in satisfaction of such incumbrance, until the amount to be paid by him and the owners of the other parcels is settled.⁴ On the same general principle, one who seeks an injunction against the foreclosure of a usurious mortgage should tender the amount fairly and legally due.⁵

¹ *Harrison v. Bray*, 92 N. C. 488.

² *Sloan v. Coolbaugh*, 10 Iowa, 31; *Powell v. Hopkins*, 38 Md. 1; *Meysenburg v. Schliefer*, 46 Md. 209; *Vechte v. Brownell*, 8 Paige (N. Y.), 212; *Jenkins v. Jones*, 2 Gif. 99; *Whitworth v. Rhodes*, 20 L. J. N. S. Ch. 105; *Robertson v. Norris*, 1 Gif. 421; *Rhodes v. Buckland*, 16 Beav. 212; *Davey v. Durant*, 1 De G. & J. 535; *Close v. Phipps*, 7 M. & G. 586. When the mortgagor enjoins the sale, and the mortgagee, in his answer, prays judgment for the mortgage debt, his right thereafter to proceed under the writ of seizure and sale enjoined is abandoned and lost. *Learned v. Walton*, 41 La. An. 233; 7 So. 723.

³ *Hill v. Kirkwood*, 28 W. R. 358; *Hickson v. Darlow*, 23 L. R. Ch. D. 690; s. c. 48 L. T. 449; 31 W. R. 417.

⁴ *Massie v. Wilson*, 16 Iowa, 390.

⁵ *Norman v. Peper*, 24 Fed. Rep. 403.

CHAPTER IX.

TO PROTECT RIGHTS PERTAINING TO CONTRACTS.

I. GENERAL PRINCIPLES AND LIMITATIONS.

II. PRINCIPLES APPLIED TO VARIOUS KINDS OF CONTRACTS.

I. GENERAL PRINCIPLES AND LIMITATIONS.

§ 468. Extensive Range of the Jurisdiction.

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484. Injunction *pendente lite* — Pending Dissolution of Corporation.

485. Mandatory Form of the Writ.

486. Diligence in seeking Relief; Laches; Waiver of Breach.

§ 468. **Extensive Range of the Jurisdiction.** — The jurisdiction to prevent violation of contracts in proper cases is as extensive as the range of subjects concerning which parties may enter into contractual relations. For the present purpose it does not become necessary to distinguish between contracts and covenants, since the principles governing courts of equity in enjoining breaches of covenant and violations of contract are identical, and for the further reason that all distinctions between sealed and unsealed instruments are abolished in most of the states. Under proper conditions and circumstances, courts of equity in modern times as freely grant relief in cases of contracts as they formerly did to prevent breaches of covenants.¹ The general principles

¹ *Singer Mfg. Co. v. Union, etc. Co.*, 6 Fish. Pat. C. (U. S.) 480; s. c. Holmes, 253; *Lumley v. Wagner*, 1 De G. M. & G. 604; affirming s. c. 5 De G. & Sm. 485, and overruling *Kemble v. Kean*, 6 Sim. 333; *Peabody v.*

pertaining to the subject will be herein considered and many illustrations given, but the subject is so illimitable in its scope that its discussion in all its possible bearings will not be attempted, nor is it necessary. Equitable jurisdiction to restrain the violation of contracts is usually based upon the necessity of protecting legal rights, and preventing fraudulent abuse of the rights of parties, and preventing irreparable injury. Superadded to one or more of these will often be found the prevention of a multiplicity of actions, as an additional ground for injunction.¹ But equity will not, as a rule, restrain the prosecution of suits at law merely to prevent multiplicity of suits, without regard to other considerations.² Injunction will only be granted where the terms of the contract are free from doubt or are not disputed, and a violation cannot be compensated for in damages at law.³ Nor can the remedy be perverted so as to compel specific performance of positive stipulations. In other words, injunction will not be granted to restrain defendant from refusing to perform a contract.⁴

§ 469. **Matters to be considered.** — And since relief in equity is based upon the absence of adequate remedy for a violation at law, it is evident that the subject-matter, the terms and peculiar situations of the parties, will each and all receive consideration in determining whether the case is a proper one for equitable interference on the ground of the inadequacy of the legal remedy. It will be seen, as the illustrations proceed, that in some cases

Norfolk, 98 Mass. 452; Wason v. Sanborn, 45 N. H. 169; Collins v. Plumb, 16 Ves. 454; Jordan v. Woodward, 38 Me. 423; Palmer v. Harris, 60 Pa. St. 158; Wolfe v. Burke, 58 N. Y. 115; Connell v. Reed, 128 Mass. 477; Guerand v. Dandeleit, 32 Md. 561; Richardson v. Peacock, 26 N. J. Eq. 40; Grow v. Seligman, 47 Mich. 607; s. c. 41 Am. Rep. 737; Spier v. Lambdin, 45 Ga. 319.

¹ Stovall v. McCutcheon, (Ky.) 54 S. W. 969.

² Peninsular Construction Co. v. Merritt, (Md.) 45 A. 172.

³ Story's Eq. Jur. §§ 925-927; Morse v. Machias Water Power Co., 42 Me. 119; Chesapeake & P. Tel. Co. v. City of Baltimore, (Md.) 43 A. 784; Morris Canal, etc. Co. v. The Society, 5 N. J. Eq. (1 Hals.) 203; Wason v. Sanborn, 45 N. H. 169; Niagara Falls, etc. Co. v. Great Western R. Co., 39 Barb. (N. Y.) 212. See Elder v. Shaw, 12 Nev. 78; Florence Sewing Machine Co. v. Singer Mfg. Co., 8 Blatchf. (U. S.) 113; Nashville, C. & St. L. Ry. Co. v. McConnell, 82 F. 65; Brown's App., 62 Pa. St. 17; Western Union Tel. Co. v. Phila., etc. R. Co., 9 Phila. (Pa.) 494; Healy v. Allen, 38 La. An. 867.

⁴ Welty v. Jacobs, 64 Ill. App. 285.

full proof of the results from a threatened breach must be made, and the court must be clearly convinced from the proof that the injury will be irreparable in its nature; in other cases, the nature of the subject-matter of the contract will be alone sufficient for that purpose either without any or with very slight evidence.¹

§ 470. **Contract affecting Real Property.** — The same rule governs in passing upon an application for relief against the threatened violation of a contract or covenant, whether it be found in the form of a covenant running with the land in a deed, in a contract for the sale of land, or in a lease as in the case of trespass or waste; and it will generally be presumed that the violation of a contract the result of which will be injurious to the inheritance is irreparable at law.² This rule is more strictly observed in England than in this country. There, the construction of a contract being clear, it is not a question of damage, but the mere circumstance that the breach of a contract is threatened affords sufficient ground for the court to interfere by injunction; and it seems the court may so interfere whether the breach has or has not been actually committed, provided the defendant claims and insists on a right to do the act which would constitute such breach.³ But in such a case, if the injunction would inflict serious loss on the covenantor, the court will not grant the injunction on an interlocutory application, but will direct the motion to stand over until the hearing of the cause, and will advance the cause.⁴ And even in England there is a clear distinction taken between cases where the violation of a contract would directly affect the use and substance of the land, and the violation of such as are only incidentally connected

¹ *Jones v. Williams*, (Mo. Sup.) 39 S. W. 486; *Id.*, 40 S. W. 353; *Dills v. Doeblor*, 26 A. 398; 62, Conn. 366; *Welty v. Jacobs*, 49 N. E. 723; 171, Ill. 624.

² *Walker v. McNulty*, (Sup.) 45 N. Y. S. 42; 19 Misc. Rep. 701. See also *Wright v. Heidorn*, (Super. Ct. Cin.) 6 Ohio Dec. 151; 4 Ohio N. P. 124; *Electric City Land & Improvement Co. v. West Ridge Coal Co.*, 41 A. 458; 187 Pa. St. 500.

³ *Tipping v. Eckersley*, 2 K. & J. 264. In this case Vice-Chancellor Wood said: "And I apprehend the court may so interfere, whether the defendant has or has not actually committed the breach, in respect of which the interference of the court is sought. For, in a case of contract, it is enough if the defendant claims and insists on a right to do the act, although he has not already done it *modo et forma*, as alleged. In such a case I should have no difficulty in granting an injunction."

⁴ *Wells v. Attenborough*, 24 L. T. 312.

with occupancy. Thus, it was held that an injunction would not be granted to restrain a threatened breach by a tenant of a stipulation in a farming agreement requiring him to keep on the farm a proper and sufficient stock of sheep, horses, and cattle.¹ In this country the violation of contracts and covenants concerning the manner of holding, using, and disposing of realty places the burden of proving that no serious or irreparable injury would result upon the defendant, and where it is not made clear at a trial whether plaintiff can obtain full damages at law for the violation of a covenant, for instance, not to build upon or incumber a certain right of way, an injunction against such violation is discretionary with the trial court, and, having been granted, will not be disturbed.²

Where relief by injunction is sought against contracts other than those relating to real estate, the court must be satisfied, from the whole case and its attendant circumstances, whether an action at law will afford the party as full and perfect redress as the remedy by injunction, and must be fully satisfied that it will not before it will interpose. Thus, it was held that an injunction to restrain an actor from playing elsewhere than for plaintiff should be denied, unless it appeared that irreparable injury, or damages incapable of being ascertained in an action at law, would result to plaintiff therefrom.³

§ 471. **Remedy at Law.**— And by whatever means it may appear, if it does appear, that the complainant has an adequate remedy at law for the threatened violation of a contract, a court of equity will refuse to lend its aid.⁴ Accordingly where, under a lease executed by an authorized agent, one enters into the

¹ *Phipps v. Jackson*, 56 L. J. Ch. 550.

² See *Dexter v. Beard*, 7 N. Y. S. 11. Where there is a technical violation of a covenant in a lease not to use the premises for a hazardous business, an injunction will not issue if plaintiffs have suffered no injury, and the grant of the relief prayed for would do wrong rather than prevent it. *Neiman v. Butler*, (Com. Pl. N. Y.) 19 N. Y. S. 403.

³ *Carter v. Ferguson*, 12 N. Y. S. 580.

⁴ *West v. Cobb*, 63 Ga. 341; *Agate v. Lowenbein*, 4 Daly (N. Y.), 62; *Hill v. Staples*, (Ga.) 11 S. E. 967; *Pell v. Northampton, etc. Ry. Co.*, L. R. 2 Ch. 100; *Harkinson's Appeal*, 78 Pa. St. 196; *Seiler v. Fairex*, 9 Blatchf. 398; *Dills v. Doeblor*, 26 A. 398; 62 Conn. 366; *Proctor & Collier Co. v. Mahin*, 93 F. 875; *James T. Hair Co. v. Huckins*, 56 F. 366; *Brown v. Niles*, 43 N. E. 90; 165 Mass. 276; *Close v. Flesher*, (Com. Pl. N. Y.) 28 N. Y. S. 737; *Jersey City Milling Co. v. Blackwell*, (N. J. Ch.) 44 A. 153.

possession of premises, and uses them for a legal purpose, the remedy of the owner to regain possession is by an action at law to recover possession, and he is not entitled to an injunction.¹ But from the circumstances of a case it may appear that a right of re-entry reserved in a lease is not so effectual a remedy for a breach of covenant as to deprive the lessor of a right to an injunction to restrain the breach.²

§ 472. **Stipulations for Forfeiture and Liquidated Damages.**—There is apparently considerable conflict of authority as to the effect upon the right of a party to an injunction to prevent its violation of a provision in a contract, for a forfeiture of the contract or for the payment of a fixed sum as liquidated damages. But an examination of the decisions and of the facts upon which each decision was based, shows that with few exceptions the cases may be reconciled upon general and conceded principles. In these, as in other cases, the character of the contract and the effect of its violation are all-important. If a violation has the effect of putting an end to the contract, it is plain that an injunction would be without benefit to the party seeking it. If, by the terms of the contract or otherwise, it appears that the parties at the time of contracting anticipated that it would be violated, and in view of such contingency and to avoid the difficulty of proving damages at law, fixed the same by agreement, they should be left to their legal remedy, upon the agreement.³ On the other hand if the contract is one whose benefit to a party depends entirely, or to a great extent, upon a strict compliance by other parties thereto with its terms and conditions, and if it appears that in fixing the damages the parties did not intend to license or consent to repeated violations, but only contemplated the possibility of a non-fulfilment in some particular, an injunction should be granted to prevent multiplicity of actions and as

¹ *Bodwell v. Crawford*, 26 Kan. 292; s. c. 40 Am. Rep. 306.

² *Stees v. Kranz*, 32 Minn. 313. Where the plaintiff was entitled to an injunction to prevent a payee from collecting a note, contrary to his agreement, it was held no answer that he had a remedy at law, as a writ of injunction is not known to the law. *Knight v. Knight*, 28 Ga. 165.

³ See *Nessle v. Reese*, 29 How. Pr. n. s. 382; s. c. 19 Abb. Pr. (N. Y.) 240; *Barnes v. McAllister*, 18 How. Pr. (N. Y.) 534. See *United States v. World's Columbian Exposition*, (C. C.) 56 F. 630; reversed in *World's Columbian Exposition v. United States*, 56 F. 654; 6 C. C. A. 58. *Contra*, *Phoenix Ins. Co. v. Continental Ins. Co.*, 14 Abb. Pr. (N. Y.) n. s. 266.

a means of compelling specific performance.¹ So there may be either a forfeiture of the contract, or such forfeiture may be of a sum certain for each violation, leaving the contract in full force. In the latter case, being in effect a liquidation of damages, similar principles to those just stated will govern, and equity will enjoin upon proper application a breach of the condition. The relief will be given as well against assignees as against original covenantors.²

§ 473. **Same — Distinctions illustrated.** — On the policy of preventing irreparable injury and interminable litigation, above outlined, an injunction was granted to restrain a violation of an agreement between partners whereby one bound himself not to engage in the same business in the same town, although it was stipulated that upon its violation five hundred dollars should be forfeited to the partner retaining and continuing the business.³ But after a contract has been already violated and an action at law for damages has been brought, equity will not interfere to prevent future violations, for the reason that the party has already selected the legal as the proper tribunal, and his election will not be interfered with. Thus, an injunction was refused *pendente lite* to restrain future violations of a contract where, after an action brought for liquidated damages, the same had been paid into court by the defendant.⁴ On the same principle, an injunction will not issue to restrain the collection of notes included in a settlement of accounts previously had between the

¹ See *Diamond Match Co. v. Roeber*, 106 N. Y. 473; 13 N. E. 419; *Gillis v. Hall*, 2 Brews. (Pa.) 342; *Nat. Prov. Bank v. Marshall*, L. R. 40 Ch. Div. 112; *A. L. & J. J. Reynolds Co. v. Dreyer*, (Super. N. Y.) 83 N. Y. S. 649; 12 Misc. Rep. 368; *McCurry v. Gibson*, (Ala.) 18 So. 806; *Beeman v. Hexter*, (Iowa) 67 N. W. 270; *Jackson v. Byrnes*, 103 Tenn. 698; 64 S. W. 984.

² *Watrous v. Allen*, 57 Mich. 362; *Barron v. Richard*, 8 Paige (N. Y.), 354; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; *Tulk v. Moxhay*, 2 Phill. (N. C.) 774; *Mann v. Stephens*, 15 Sim. 377; *Hills v. Miller*, 3 Paige (N. Y.), 254; *Linzee v. Mixer*, 101 Mass. 512; *Gilbert v. Peteler*, 38 N. Y. 153. In *French v. Macabe*, 2 D. & War. 269, it is laid down that where a covenant is not to do a particular act, and a penalty or forfeiture is annexed to the doing of that act, this penalty does not authorize the party to do the act; and before the act is done, that the court will restrain him by injunction; but that if the act is done, the penalty must be paid, and the amount is unimportant.

³ *Ropes v. Upton*, 125 Mass. 258; *Stafford v. Shortreed*, 62 Iowa, 524; *Diamond Match Co. v. Roeber*, 85 Hun (N. Y.), 421. Compare *Vincent v. King*, 13 How. (N. Y.) Pr. 234.

⁴ *Mapleson v. Del Puente*, 13 Abb. (N. Y.) N. Cas. 144.

parties.¹ And where it was provided that "this sum [the sum agreed upon] is already forfeited by any violation of the contract, and requires no particular legal proceedings for its execution," it was held that the complainants, having fixed by their own estimate the extent of injury they would suffer from a non-observance of this condition in the contract, and having indicated that the only forum in which they could seek redress, and recover the stipulated penalty or forfeiture, was a court of law, they were precluded from resorting to a court of equity for relief by way of injunction.² But where a contract for the exclusive services of a singer, in opera, provided for "the forfeiture of a week's salary, or the termination of the engagement at the manager's option, without debarring him from enforcing the contract as he might see fit," it was held that the damages were not liquidated by the use of the above language, and that an injunction might issue to restrain a threatened violation of the contract.³

§ 474. **Same — Forfeiture for Breach of Restrictive Covenant.** — The fact that a breach of a condition upon which lands are sold shall terminate the estate granted and give the grantor the right of re-entry, does not deprive the latter of the benefit of an injunction to prevent a threatened violation of the conditions on the ground that he has a remedy at law by forfeiture under the condition. This rule was applied upon the following facts: Plaintiff sold and conveyed a certain tract of land with the express stipulation and restriction that the vendee, his heirs and assigns, would not make, sell, or permit to be made or sold thereon, any intoxicating liquors, on pain of forfeiting the title to the land, and that on breach of the condition the vendor might re-enter. The vendee sold and conveyed a portion of the tract to the defendant, and other lots in the tract to other parties, who built houses thereon. The defendant commenced to sell intoxicating liquors on his lot, and plaintiff brought suit to enjoin him, and the relief was granted.⁴

§ 475. **Relation of Complainant to Contract justifying Interference.** — The question of qualification of parties and of the inter-

¹ *Melcher v. Exchange Bank*, 85 Mo. 362.

² *Hahn v. Concordia Society*, 42 Md. 460.

³ *McCaull v. Braman*, 16 Fed. Rep. 37.

⁴ *Richards v. Burdsall*, (N. J.) 10 A. 274. But where the reason for the restriction had ceased by the locality becoming a manufacturing section an injunction was refused. *Jackson v. Stevenson*, (Mass.) 31 N. E. 691.

est which a party must have in the subject-matter of litigation is governed to a great extent by established rules of practice, which are elsewhere considered;¹ but it may be well to give some attention in this connection to the application of these rules in cases where preventive relief is sought against the violation of contracts by parties claiming an interest in having specific performance. The broadest rule on the subject is the same in equity as at law, to the effect that a party having no direct connection as a party to the contract, either by entering into it in the first instance, or by novation and substitution, can, under the contract, have no relief against its violation. Thus, it was held that a husband could not be enjoined from carrying on a millinery business in a certain city, because his wife had entered into a contract not to engage in such business therein.² And one not a party to a contract between another and a town, but merely a citizen of the town, cannot demand an injunction against a breach, his interest not being special.³

§ 476. **Relief not confined to Written Contracts.** — The jurisdiction is exercised in the case of oral contracts with like effect as where they are or have been put in writing.⁴ In other words, a court of equity will grant an injunction in all cases where there exists a valid contract, and the mischief arising from a breach of it cannot be repaired or well estimated.⁵ Accordingly a photographer, who had taken a negative likeness of a lady to supply her with copies for money, was restrained from selling or exhibiting copies, on the ground that there was an implied contract not

¹ *Infra*, Chap. XXIV. A jockey club induced the owner of a mare in foal to enter the colt for a race known as the "Futurity," to take place August 29, 1891. When the colt was a year old, it was sold as eligible to the race, the club's rules allowing such sales. The stakes were made up of fees from such entries and a purse contributed by the club. The colt was properly entered, and the purchaser offered to pay the fee required, and to comply with all conditions precedent. *Held*, that a mandatory injunction would lie to compel the club to permit the colt to enter the race. *Corrigan v. Coney Island Jockey Club*, 15 N. Y. S. 705.

² *Emmert v. Richardson*, 44 Kan. 268; 24 P. 480.

³ *Bosworth v. Norman*, 14 R. I. 521. See also *Dent v. Ross*, 35 Pa. St. 337, which was an assigned contract concerning land; also *Nashville, C. & St. L. Ry. Co. v. McConnell*, 82 F. 65.

⁴ *Harrison v. Gardner*, 2 Madd. 198; see *Hubbard v. Miller*, 27 Mich. 15; *Spier v. Lambdin*, 45 Ga. 319.

⁵ *McClurg's App.*, 58 Pa. St. 51; *Manhattan, etc. Co. v. Jersey, etc. Co.*, 23 N. J. Eq. 161. But see *Manhattan Mfg. Co. v. Van Keuren*, 23 N. J. Eq. 251.

to use the negative for such purposes, and on the further ground that such sale or exhibition was a breach of confidence.¹ But in order to have enjoined a purely executory contract it must be such a one as is valid and enforceable at law ; and if it be such a contract as by the statute of frauds is required to be in writing, and has not been executed by either of the parties, an injunction to prevent its violation will not be granted. Accordingly it was held that if the owner of two adjacent lots of land conveys one of them subject to a condition that the buildings to be erected thereon shall be set back a certain distance from the street, and with a warranty that the premises are free from all incumbrances made or suffered by him, a previous mutual oral agreement between the grantor and the grantee, that they will set back the buildings to be erected by them a greater distance from the street, is not a ground for an injunction to restrain the grantee from building within the prescribed distance from the street.² So where a conveyance of land is obtained upon a verbal promise that the purchaser will subsequently secure the purchase-money by a mortgage, which he afterwards refuses to do, this will not constitute a sufficient ground for enjoining the purchaser from selling the land, unless deception was practised in obtaining the conveyance.³

§ 477. **Violation of Implied Terms enjoined.** — To warrant an injunction it is not necessary that the threatened act would be a violation of the express terms of the contract; it is sufficient if it would be a violation of its spirit and meaning.⁴ Accordingly where a party has covenanted not to erect a building within a certain distance of a boundary line, he may be enjoined from erecting a fence that will have the same effect of excluding light and air.⁵ So where defendant, an actress, by her contract with

¹ Pollard v. Photographic Co., L. R. 40 Ch. Div. 345.

² Hubbell v. Warren, 8 Allen, (Mass.) 173.

³ Ellsworth v. Starbird, 32 Me. 176. Where a grantor of land to a railroad company, trusting to the assurance of the president that the proper stop-gaps should be erected as needed, neglected to put in the deed any stipulation therefor, an injunction against using the land until they should be erected was refused. Cook v. North, etc. R. R. Co., 46 Ga. 618.

⁴ Kelley v. Kelley, 2 Phila. (Pa.) 380; Richardson v. Peacock, 26 N. J. Eq. 40; Hall v. Box, 18 W. R. 820; Clark v. Layne, (Ky.) 30 S. W. 644; Althen v. Vreeland, (N. J. Ch.) 36 A. 479. Compare Byrd v. Bazemore (N. C.) 28 S. E. 965.

⁵ Wright v. Evans, 2 Abb. (N. Y.) Pr. n. s. 308; Phoenix Ins. Co. v. Continental Ins. Co., 14 Abb. Pr. (N. Y.) 266.

plaintiff agreed to appear in seven performances in each week, which plaintiff might give, it was held that, as it was not possible for her to perform elsewhere without violating the contract, the fact that it did not contain a negative clause, binding her not to appear elsewhere, was not ground for refusing plaintiff an injunction.¹ But the implied terms of a contract, the violation of which will be prevented, must be such as follow naturally from a reasonable construction. For this purpose, no covenants abridging the ordinary rights of a party outside the subject-matter of the contract are implied. Thus, an injunction will not be granted restraining a party from resuming business by reason of his having sold the good-will of his trade, unless he has expressly covenanted not to resume his trade in that vicinity.²

§ 478. **Specific Performance as a Test.** — Where a contract is one of a class which will be specifically enforced, a court of equity will enjoin its breach, if that is the only practicable mode of enforcement which its terms permit.³ And equity will often restrain the violation of covenants by injunction, notwithstanding that their nature is such that specific performance would

¹ *Duff v. Russell*, 14 N. Y. S. 134; s. c. 16 N. Y. S. 958; affirmed 31 N. E. 622, holding also that in such case the rights of both parties having been expressly reserved, the court, even after plaintiff's contract had expired, would determine plaintiff's original right to relief by injunction. To same effect *Montague v. Flockton*, L. R. 16 Eq. 189.

² *Shackle v. Baker*, 14 Ves. 468; *Stephens v. Aulls*, 8 Thomp. & C. (N. Y.) 281; *Kennedy v. Lee*, 3 Meriv. 441; *Cruttwell v. Lye*, 17 Ves. 335; *Churton v. Douglas, John*, 174; *Bradford v. Peckham*, 9 R. I. 250. In *Churton v. Douglas*, *supra*, Vice-Chancellor Wood said: "The authorities, I think, are conclusive upon this point, that sale of the good-will of a business, without more, does not imply a contract on the part of the vendor not to set up again a similar business himself. I use the expression 'similar business' purposely in order to distinguish the case I am supposing from one where, as here, the vendor seeks to set up again the identical business which he has professed to sell. Upon a sale of the good-will of a business, the vendor is not precluded from carrying on a precisely similar business, with all the advantages he may be able to acquire from his own industry and labor, and from the regard people may have for him, and that in a place next door, for example, to the very place where the former business was carried on. And upon the authorities it is settled that if the purchaser wishes to prevent that step from being taken, it is his fault if he does not take care to insert provisions to that effect in the deed."

³ *South Chicago City Ry. Co. v. Calumet Electric St. Ry. Co.*, 49 N. E. 576; 171 Ill. 391.

not be decreed.¹ Accordingly a court of equity, without determining the question of the validity of a contract under which a railroad company transferred its right to construct and operate a telegraph line along the line of the road (the right to make the contract having been conferred by statute), will enjoin its violation pending such determination, although the contract be one of which specific performance could not be decreed.² And it was held that equity might enjoin a violation of an existing contract, notwithstanding it was terminable at the option of one only of the parties.³ But the court will not interfere by injunction to restrain the breach of a contract for the sale and delivery of chattels which it could not specifically perform.⁴ And where a bill is brought for a specific performance of a contract, and also an injunction to protect the subject-matter of the contract, an injunction will not be sustained, unless the party is entitled to a specific performance.⁵

§ 479. **Complainant must establish Equitable Claim to Relief.** — The ground relied upon for relief by injunction against the violation of a contract, must, as in other cases where the remedy is sought, come within the rules according to which the court usually exercises jurisdiction; and the party must show himself free from all just imputations of wrong-doing in connection with the contract forming the subject of his application.⁶ But a party

¹ *Chicago & Alton R. R. Co. v. New York, Lake Erie, etc. R. R. Co.*, 24 Fed. Rep. 516; *Sanche v. The Electrolibration Co.*, 4 App. D. C. 453.

² *Western Union Telegraph Co. v. Union Pac. R. R. Co.*, 1 McCrary Ct. 558.

³ *Singer Sewing Machine Co. v. Union Buttonhole Co.*, 1 Holmes, 253.

⁴ *Fothergill v. Rowland*, L. R. 17 Eq. 132.

⁵ *Geiger v. Green*, 4 Gill (Md.), 472; *Gelston v. Sigmund*, 27 Md. 334; *Fargo v. New York & N. E. R. Co.*, (Sup.) 23 N. Y. S. 360; 3 Misc. Rep. 205.

⁶ See *Landis v. Landis*, 41 N. J. 119, 664; 2 A. 620; on re-hearing, 7 A. 647; *Troy & Boston R. R. Co. v. Boston, Hoosac Tunnel, etc. R. R. Co.*, 86 N. Y. 107; *Dubuque & S. C. R. Co. v. Cedar Falls & M. R. Co.*, 76 Iowa, 702; 39 N. W. 691; *Alvord v. Fletcher*, 51 N. Y. S. 117; 28 App. Div. 493; *Flint v. Charman*, 39 N. Y. S. 892; 6 App. Div. 121; *Stockton v. Russell*, (C. C. A.) 54 F. 224; *Pullman's Palace-Car Co. v. Missouri, K. & T. Ry. Co.*, (C. C.) 55 F. 138; *Emery v. New York, L. E. & W. R. Co.*, (Sup.) 30 N. Y. S. 306; 9 Misc. Rep. 310; *Ketchum v. Sandt*, (N. J. Ch.) 26 A. 863; *Town of Westminster v. Willard*, (Vt.) 26 A. 952; *Brunner v. Kaempfer*, (Sup.) 37 N. Y. S. 700; 2 App. Div. 177.

INTERFERENCE WITH REBUILDING DAM UNDER CONTRACT. — Plaintiff, being about to erect a dam across a water-course, which defendant opposed,

who has entered into a contract which is contrary to a statute forbidding monopolies and combinations, on withdrawing therefrom is entitled to an injunction to prevent the combination from taking possession of its property pursuant to the contract.¹ Thus, where a person has lent his name as maker of a note, to enable the person to whom it is lent to keep up a false credit by using the paper as business paper, he cannot come into court for relief against the consequences.² Nor will equity interfere with the operation of the statute of frauds at the instance of either party to a fraudulent conveyance.³ On the same principle a preliminary injunction will be refused a grantor, to restrain the grantee of a certain lot and others from drilling an oil or gas well thereon, in violation of a covenant in the deed from the grantor, where he has himself violated the covenant by

and was about to enjoin, entered into an agreement with the latter that, if he would not enjoin the work, but permit its completion, defendant might remove the dam, if, in the high-water season, it should prove injuriously to subject defendant's lands to overflow, on giving the plaintiff notice in time to close a ditch leading from the water-course through his plantation. Subsequently, in accordance with his agreement, defendant cut and removed the dam, and plaintiff sought by injunction to restrain defendant from interfering with the rebuilding of the same. *Held*, the contract being fully executed and the *status quo* restored, the injunction was properly granted. *Eagan v. Russ*, 39 La. 967; 8 So. 85.

TERMS OF CONTRACT UNFAIR. — An agreement whereby one agrees to play base ball for a club for a period of time which, at the option of the club, might equal the term of the player's life, and which reserves to the club the right to discharge the player at ten days' notice, without cause, is not an agreement enforceable by an injunction against its violation by the player. It is too unfair and wanting in mutuality. *Philadelphia Ball Club v. Hallman*, 8 Pa. Co. Ct. Rep. 57.

PATRONAGE OF FERRY — INADEQUATE MEANS OF TRANSPORTATION. — Complainant, having the right under its charter of transporting its passengers and freight across a river by means of its own boats, agreed, for a consideration, to use for such purpose only the public ferry operated by a private party under a lease. The ferry proving inadequate, complainant commenced running its own boats for purposes of transportation. It was held, that equity would not protect complainant from the consequences of its failure to comply with the contract, by enjoining the operators of the ferry from interfering with the operation of complainant's boats. *Texas & Pac. Ry. Co. v. City of Baton Rouge*, 36 F. 845.

¹ *Merz Capsule Co. v. United States Capsule Co.*, (C. C.) 67 F. 414.

² *Davenport v. City Bank of Buffalo*, 9 Paige (N. Y.), 12.

³ *Ellington v. Currie*, 5 Ired. (N. C.) Eq. 21. A demand growing out of an illegal transaction, which cannot be recovered or enforced directly, cannot be set off at law, or be made the foundation of a proceeding in chancery for an injunction against a legal demand. *Pond v. Smith*, 4 Conn. 297.

drilling wells in the same addition in which the lot lies, and the affidavits of the lot-owners in the addition show that the covenant was not intended as a reservation of the oil and gas, but as a restriction to be placed in all the deeds of lots sold in the addition, to secure them, as dwelling-places, from the annoyance of oil and gas wells.¹ And a court of equity has power to prevent a defendant from setting up the statute of limitations as a defence to an action at law which the defendant has prevented the plaintiff from bringing until sufficient time has elapsed to render such defence available to him.² But it is an indispensable requisite to the exercise of such power that it shall be made clearly to appear that the plaintiff was prevented, by the act of the defendant, from suing until his action at law was barred.³

§ 480. **Same Subject.** — Not only must complainant show himself free from all blame as just stated, but he must present equitable, as contradistinguished from legal, grounds for relief.⁴ On this principle it was held that a preliminary injunction would not be granted to compel the lessees of an opera-house to allow the complainants to use the house in accordance with a contract therefor, where such injunction would compel the lessees to break a similar contract made by them with an innocent third party, and the complainants could not use the house with profit to themselves.⁵ So where under a contract for a purchase of land the purchaser forfeited all his rights by non-payment of part of the purchase-money at the time stipulated, and the vendor claimed a house which the purchaser while in possession had been erecting, and pending the litigation moved for an in-

¹ Appeal of Acheson (*Acheson v. Stevenson*), 130 Pa. St. 633, 18 A. 873.

ABUSE OF HUNTING PERMIT. — In a suit for an injunction to restrain defendants from interfering with the exercise of a hunting right upon defendants' premises, granted by defendants to plaintiffs, it appearing that plaintiffs had, in excess of the right granted, issued permits to third persons to hunt upon the premises, who hunted in places not included in the grant, and committed various depredations, — *held*, that an injunction would not be granted, although defendants were guilty of acts which interfered with the legitimate exercise of the right. *Bingham v. Salene*, 15 Or. 208; 14 P. 523.

² *Lamb v. Martin*, 43 N. J. 34; 9 A. 747.

³ *Ibid.*

⁴ See *Healey v. Dillon*, 39 La. 503; 2 So. 49; *Healey v. Allen*, 38 La. An. 897; *Kemble v. Philada. G. & N. R. Co.*, 140 Pa. St. 14; 21 A. 225; *Automatic Phonograph Exhibition Co. v. North American Phonograph Co.*, 45 F. 1; *Tawas & Bay County R. R. Co. v. Iosco Circuit Judge*, 44 Mich. 479; *Thompson Gas Co. v. Fayette, etc. Co.*, (Pa.) 21 A. 93.

⁵ *Foster v. Ballenberg*, 43 F. 821.

junction in equity to prevent the removal of the house by the vendee, it was held that the injunction should be refused.¹

§ 481. **Legal Validity of Contract doubtful.** — It is a well-settled principle governing the remedy by injunction that it will not ordinarily be granted to restrain violation of contracts concerning the legal validity or the terms of which there is a dispute, and concerning which upon the bill and answer there are serious doubts.² Accordingly, an agreement not to enter into a certain business will not be enforced by preliminary injunction, at the suit of the assignee of the covenantee, where the defendants are abundantly solvent, and there is doubt whether the agreement, being in general restraint of trade, is valid whether it is supported by an adequate consideration, and whether it is assignable.³ And since the question whether a restraint of trade which is to endure during the life of the promisor or covenantor is reasonable or not is an undecided question in New Jersey,

¹ *Crane v. Dwyer*, 9 Mich. 350. See also *Hill v. Haberkorn*, 53 Hun, 637; 6 N. Y. S. 474. The last case being for an injunction, and not involving a question of rescission, it was held not necessary that defendant should return the amount received by her under the first contract before she could make the defence of its non-performance by plaintiff.

² *Morris Canal, etc. Co. v. Society for Establishing Useful Manufactures*, 5 N. J. Eq. (1 Hals.) 203; *De Lacy v. Adams*, (Super. N. Y.) 23 N. Y. S. 297; *Trenwith v. Dealy*, 12 Phila. (Pa.) 386; *Babcock & Wilcox Co. v. World's Columbian Exposition Co.*, (C. C.) 54 F. 214, involving right to use of boilers in World's Fair Building; *Mutual Reserve Fund Life Ass'n v. New York Life Ins. Co.*, 75 Law T. n. s. 528; *Jones v. Williams*, 139 Mo. 1, a restrictive contract of personal employment; *Perkins v. Foye*, 60 N. H. 496, right to draw water from reservoir doubtful and disputed; *Mandeville v. Harman*, 42 N. J. 185; 7 A. 37, contract of doubtful validity because in partial restraint of trade; *Birnbaum v. Salomon*, 22 Fla. 610, terms of sale and lease to grantor in dispute and the evidence conflicting; *Allison Bros. Co. v. Allison*, 54 Hun, 635; 7 N. Y. S. 268. The last was a complicated deal concerning patent rights between brothers, a corporation and a third party. It was held that the agreements did not so clearly transfer to plaintiff or assure to it the right to any interest in any invention of one of the brothers not already patented, or which should be patented as improvements on the former patent, as to justify a temporary injunction for violation of the contract by using any improved machine of defendant's invention pending the trial of such issue. See also *Barnes v. McAllister*, 18 How. (N. Y.) Pr. 534. The court will not inquire into the adequacy of the consideration. *McClurg's Appeal*, 58 Pa. St. 51. The general principles which govern courts of equity in determining applications to enjoin one of the parties to a contract from proceeding in violation of it, pending a suit, where the legal right of the complainant is not clear, — explained. *Singer Mfg. Co. v. Union Buttonhole, etc. Co.*, 6 Fish. Pat. Cas. 480.

³ *American Preservers' Co. v. Norris*, 43 F. 711.

such a restraint is not enforceable by injunction.¹ So, where there were serious doubts whether a city had been legally created a municipality, a preliminary injunction at its suit was refused where sought to restrain a waterworks company from constructing works and laying pipes in its streets.² It is a plain case for refusing an injunction where the disputed legal question has once been tried in a court of law and decided adversely to complainant.³

§ 482. **Terms of Contract disputed and doubtful.** — The same reasons exist for not granting a perpetual injunction, or, if a temporary injunction has already been granted, for dissolving it, where upon the pleadings or upon the evidence introduced at the hearing there remain substantial doubts as to what are the terms of the contract the violation of which it is sought to enjoin, as where the legal validity of the contract is doubtful.⁴ Thus it was held that an agreement to “never tow vessels in competition” with complainants or either of them, was too uncertain and indefinite to be enforced by injunction, since every case of alleged violation would involve the consideration of the questions of fact, depending on the peculiar circumstances of each case, whether there was in fact any competition, whether complainants at the time were furnishing sufficient facilities, and what ought to be considered sufficient facilities.⁵ So an injunction was refused where it appeared that there was not in fact the contract alleged, but only an agreement to negotiate for a contract;⁶ also where the question turned upon the payment of a license fee, the right to which as well as the fact of its payment was disputed.⁷

¹ *Mandevile v. Harman*, 42 N. J. 185; 7 A. 37.

² *Appeal of City of Chester*, (Pa.) 8 A. 400.

³ *Hagerty v. Lee*, (N. J.) 21 A. 933.

⁴ *Butler Tp. School District v. Dougherty*, (Pa. Com. Pl.) 13 Pa. Co. Ct. R. 233; *Hinkson v. Statzell*, 7 Del. Co. R. 474.

⁵ *Caswell v. Gibbs*, 33 Mich. 331.

⁶ *Metropolitan Exhibition Co. v. Ewing*, 42 F. 198; 24 Abb. N. C. 419.

⁷ *Round Lake Ass'n v. Kellogg*, 58 Hun, 605; 11 N. Y. S. 854. The question whether apartment houses or “flats” are “tenement houses” within the meaning of an agreement not to erect on certain premises “any house of the character or description commonly known as ‘tenement-houses,’” is not so reasonably free from doubt as to authorize a preliminary injunction in an action to restrain the erection of “flats” on such premises. *Boyd v. Kerwin*, (Sup.) 15 N. Y. S. 721. See also *Gatzmer v. German Roman Catholic St. Vincent Orphans' Asylum*, (Pa. Sup.) 23 A. 452.

LOST DEED — FAILURE OF PROOF. — An injunction cannot stand based

But it is not necessary that all the terms of the contract be definite and certain, if that part be so as to which the relief is sought.¹

§ 483. **Same — Temporary Injunction.** — But where the consequences of the violation of a contract upon the showing made by the bill would if permitted be serious or irreparable, a temporary injunction will usually be granted in the first instance, pending a determination of the controverted issues made by the answer. Thus, it was held that upon a prayer for an injunction to restrain a railroad company from preventing the reconnection and use of a telegraph line, and although the cause of the contract giving the plaintiff an exclusive right might be void, or even should the whole contract be declared void upon the final hearing of the case, an injunction should issue to remain in force until the validity of the contract should be passed upon, and an adjustment of accounts growing out of its execution in the past should be had.²

§ 484. **Injunction pendente lite — Pending Dissolution of Corporation.** — In an action for damages for a breach of contract, the party injured may also pray for an injunction restraining a repetition or continuance of the breach, as where the breach alleged was a violation of a contract by defendant not to engage, in the same town, in a similar business to the one sold to plaintiff. In such case the petition should aver a continuing and present engagement in the business, to entitle plaintiff to an injunction.³ On the same principle a party may in a proper case be entitled to an injunction against a corporation to prevent its dissolution, where to allow it to dissolve would deprive him of all remedy for the violation of a contract; for instance, in a case such as the following: A corporation, the owner of certain patents, granted an exclusive license to the complainant to sell machines containing the patented inventions, and agreed to furnish the

on a written agreement alleged to be lost, where the bill does not allege that the party in whose custody it was placed has been asked to produce it, nor that its contents can be proved, and where it appears that the party who executed it is dead, and its existence and all transactions concerning it are fully denied by the answer. *Kent v. De Baun*, 12 N. J. Eq. (1 Beas.) 220. See *Grenell v. Stillwell*, 60 Hun, 577; 14 N. Y. S. 262.

¹ *Rock Island & P. Ry. Co. v. Dimick*, (Ill. Sup.) 82 N. E. 291.

² *Western Union Tel. Co. v. St. Joseph & Western Ry. Co.*, 1 McCrary C. Ct. 565. See also *Pope v. Bell*, 35 N. J. Eq. 1.

³ *Berger v. Armstrong*, 41 Iowa, 447. *Comp. Spicer v. Hoop*, 51 Ind. 365.

machines at a certain price. After furnishing many machines, the corporation, without fault of the complainant, refused to deliver more, assigned the patent to one having knowledge of the contract, in trust for another association, and took measures for its own dissolution. On bill in equity by the licensee, a preliminary injunction was granted, restraining the corporation from dissolving its organization, and the assignee in trust of the patents from transferring them.¹

§ 485. **Mandatory Form of the Writ.** — When necessary, a court of equity, in order to give effect to the remedy, and where simple restraint on the part of the defendant will not afford the relief to which the complainant is entitled, will issue an injunction mandatory in form commanding the requisite things to be done. And the fact that a natural gas company has completed its wrongful act in turning off the flow of the gas from plaintiff's factory, will not prevent the issuance of a preliminary injunction, mandatory in its effect, compelling it to restore the flow of the gas until the final hearing.²

§ 486. **Diligence in seeking Relief — Laches — Waiver of Breach.** — A complainant seeking extraordinary relief by injunction against the breach of a contract or covenant must come in due time to assert his right, and will be denied an injunction if he has delayed acting until the rights of innocent third parties have become involved, or the parties against whom the remedy is sought have been induced by his acquiescence, without fault of their own, to alter their positions to their injury. Accordingly an injunction was refused to restrain the breach of a covenant that buildings should be erected upon a general plan, it appearing that the covenantee had acquiesced in a partial deviation from the plan, and had not made immediate application to the court.³

¹ *Singer Sewing Machine Co. v. Union Buttonhole, etc. Co.*, 1 Holmes, 253.

² *Whiteman v. Fayette Fuel Gas Co.*, 139 Pa. St. 492; 20 A. 1062. Compare *Suburban Const. Co. v. Nangle*, 70 Ill. App. 384.

³ *Roper v. Williams, T. & R.* 18; *Ocean City Ass'n v. Schurch*, 41 A. 914. Where a vendor, having taken from each of several purchasers of plots of building land, formerly the same estate, a covenant to build only in a specified manner, has permitted, without interference, material breaches of the covenant to be committed by some of the purchasers, he cannot obtain an injunction to compel another purchaser to observe the same covenant; there is no difference in the case where the covenant is not only a covenant by each purchaser with the vendor, but also a covenant by each purchaser with all the others; nor in the case where the breaches have been committed before the defendant became a purchaser and executed the deed of covenant. *Peek v. Matthews*,

The general rule was laid down in this case that a landlord who relaxes in favor of some of his tenants a covenant entered into for the benefit of all, is not entitled to an injunction to restrain the other tenants from infringing that covenant. In another case it appeared that an agreement was made, and a large part of the property embraced in it was conveyed. Three years afterwards the vendee filed a bill for a conveyance of the rest, and a year after that time the vendor prayed for an injunction to restrain the vendees from conveying, on the ground that the agreement was obtained by fraud, which it appeared he knew of at the time. The answer denied the equity of the vendor's bill. It was held that the vendor was guilty of great laches, and so the injunction was dissolved with costs to the respondent.¹

II. PRINCIPLES APPLIED TO VARIOUS KINDS OF CONTRACTS.

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| <p>§ 487. Negative Stipulations.</p> <p>488. Same — Not to practise Profession or engage in Trade.</p> <p>489. Same — Careful Scrutiny of such Contracts.</p> <p>490. Same — Terms of Contract too General.</p> <p>491. Violation of Contract of Sale of Good-will.</p> <p>492. Use of Name in Trade.</p> <p>493. Contracts for Service requiring Peculiar Skill.</p> <p>494. Disclosing Trade Secrets.</p> <p>495. Violations of Contracts concerning Real Estate ; Erections.</p> <p>496. Same — With Respect to Lots on Common Plat.</p> <p>497. Same — With Reference to Encroachments upon Alley or Private Way.</p> <p>498. Pertaining to Lease — In Favor of Lessor — Use of Premises.</p> <p>499. Same — Assignment of Lease ; Sub-letting.</p> <p>500. Same — Disturbance of Possession.</p> <p>501. Same — Interference with Enjoyment of Possession.</p> | <p>§ 502. Contract for Sale of Lands — Suit for Purchase-money — Failure of Title.</p> <p>503. Breach of Agreement to devise Lands.</p> <p>504. Violation of Contract to furnish Water, Gas, etc.</p> <p>505. Breach of Contract by Common Carrier.</p> <p>506. Withdrawal and Abuse of License.</p> <p>507. Withdrawal by City of Permit to Railroad Company to build in Streets.</p> <p>508. Contracts relating to Legal Proceedings.</p> <p>509. Same — Mutual Covenants ; Agreement to pay Mortgage.</p> <p>510. Collateral Agreements pertaining to Negotiable Paper.</p> <p>511. Contract with Municipality.</p> <p>512. Negative Stipulations — General View.</p> <p>513. Threatened Violation, what constitutes.</p> <p>514. Where Parties equitably bound — Prevention of Fraud.</p> <p>515. Same — Further Illustrations.</p> |
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§ 487. **Negative Stipulations.** — One of the most frequent cases calling for preventive relief is where parties seek to restrain the

L. R. 8 Eq. 515. See also *Ocean City Ass'n v. Schurch*, (N. J. Eq.) 41 A. 914. Compare *Western v. McDermott*, L. R. 2 Ch. 72.

¹ *Trustees, etc. v. Gilbert*, 12 N. J. Eq. (1 Beas.) 78. But a landlord was

violation of provisions in contracts for not engaging in a particular kind of business, or not setting up in business or in a profession in the same town or vicinity, or not selling an article to any other person than the complainant, or not engaging to perform services for others, or not to do other acts. Such provisions are designated by the general term of negative stipulations, and will be enforced by injunction when reasonable and not in illegal restraint of trade.¹ But to warrant relief the violation must be substantial and not merely nominal or trivial.²

§ 488. **Same — Not to practise Profession or engage in Trade.** — An injunction will be granted to prevent violation of a contract founded upon a valuable consideration not to enter into a particular trade or business at a particular place.³ Such contracts are valid only so far as they exclude a party from engaging in business in the same town, city, or other local subdivision of a state or country. If they attempt to prevent a person from resuming his business or calling anywhere in the whole realm or

held entitled to an injunction to prevent the violation by the tenant of a restriction upon the use of the demised premises, although the term for which the premises were demised had nearly expired. *Hovnanian v. Bedessern*, 63 Ill. App. 353.

¹ *Star Brewery Co. v. Primas*, 45 N. E. 145; 163 Ill. 652; *Dubowski v. Goldstein*, [1896] 1 Q. B. 478; *Standard Fashion Co. v. Siegel-Cooper Co.*, 52 N. Y. S. 433; 30 App. Div. 564; *Brown v. King*, 101 Cal. 295; *Downing v. Lewis*, (Neb.) 76 N. W. 900; *Zimmermann v. Gerzog*, (Sup.) 43 N. Y. S. 339; 13 App. Div. 210; *New York Bank-Note Co. v. Hamilton Bank-Note Engraving & Printing Co.*, 81 N. Y. S. 1060; 83 Hun, 593; *Lowenbein v. Fuldner*, (Super. N. Y.) 21 N. Y. S. 615; 2 Misc. Rep. 176; *Anderson v. Rowland*, (Tex. Civ. App.) 44 S. W. 911.

² *Weil v. Auerbach*, 53 N. Y. S. 339; 33 App. Div. 629.

³ *Smalley v. Greene*, 52 Iowa, 243; *Diamond Match Co. v. Roeber*, 35 Hun (N. Y.), 421; *Baumgarten v. Broadway*, 77 N. C. 8; *Hedge v. Lowe*, 47 Iowa, 137; *Palmer v. Graham*, 1 Pars. (Pa.) 476; *Reece v. Hendricks*, 1 Leg. Gaz. (Pa.) 79; *Carroll v. Hicks*, 10 Phila. (Pa.) 308; *Eckert v. Gerlach*, 12 Phila. (Pa.) 530; *Jenkins v. Temples*, 39 Ga. 655; *Meriden Co. v. Parker*, 39 Conn. 450; *Thayer v. Younge*, 86 Ind. 259; *Baker v. Pottmeyer*, 75 Ind. 451; *Guerand v. Dandele*, 82 Md. 561; s. c. 3 Am. Rep. 164; *Ropes v. Upton*, 125 Mass. 258. See *Berger v. Armstrong*, 41 Iowa, 447; *Harkinson's Appeal*, 78 Pa. St. 196; *Spicer v. Hoop*, 51 Ind. 365; *Hahn v. Concordia Society*, 42 Md. 460; *Royer Wheel Co. v. Miller*, (Ky.) 50 S. W. 62; *O'Neal v. Hines*, (Ind. Sup.) 43 N. E. 946; *Niles v. Fenn*, (Super. N. Y.) 33 N. Y. S. 857; 12 Misc. Rep. 470; *A. L. & J. J. Reynolds Co. v. Dreyer*, (Super. N. Y.) 33 N. Y. S. 649; 12 Misc. Rep. 368; *Davies v. Racer*, (Sup.) 25 N. Y. S. 293; 72 Hun. 43; *Emrick v. Groome*, (Com. Pl.) 4 Pa. Dist. R. 511. See also *Northern R. R. v. Railroad Co.*, 66 N. H. 560; *Newark Pass. Ry. Co. v. Township*, 53 N. J. Eq. 248; *Gaslight & Coke Co. v. City of New Albany*, 139 Ind. 660; *Eisel v. Hayes*, 141 Ind. 40.

state, they are invalid because in restraint of trade, and their violation will not be enjoined. Parties have been restrained from violating contracts which were valid according to these rules in many cases, for instance, publishers,¹ innkeepers,² attorneys,³ druggists,⁴ dressmakers,⁵ photographers,⁶ dentists,⁷ telegraph companies,⁸ undertakers,⁹ and physicians.¹⁰ An injunction will be issued to restrain a violation of the implied terms and spirit of such an agreement, as where one undertakes to carry on the business in another name.¹¹

¹ *Beal v. Chase*, 31 Mich. 490; *Spicer v. Hoop*, 51 Ind. 365; *Tallis v. Tallis*, 1 El. & Bl. 381; *Ingram v. Stiff*, 5 Jur. n. s. 947; *Dakin v. Williams*, 1 Wend. (N. Y.) 67; *Ward v. Beeton*, 23 W. R. 533; *Conrad v. Dowling*, 6 Blackf. (Ind.) 481; *Presbury v. Fisher*, 18 Mo. 50; *Noah v. Webb*, 1 Edw. (N. Y.) Ch. 604; *Cowan v. Fairbrother*, (N. C.) 24 S. E. 212; *Jones v. Williams*, (Mo. Sup.) 39 S. W. 486; *Id.*, 40 S. W. 353.

² *Stines v. Dorman*, 25 Ohio St. 580; *Heichew v. Hamilton*, 3 Greene (Iowa), 596; 4 Greene (Iowa), 317; *Hatcher v. Andrews*, 5 Bush (Ky.), 561; *Evans v. Elliott*, 20 Ind. 283; *McAllister v. Howell*, 42 Ind. 15; *Mossop v. Mason*, 16 Grant's Ch. 302; s. c. 17 Grant's Ch. 36; 18 Grant's Ch. 450; *Elliott's Appeal*, 60 Pa. St. 161.

³ *Smalley v. Greene*, 52 Iowa, 241. See *Hedge v. Lowe*, 47 Iowa, 137; *Holbrook v. Waters*, 9 How. (N. Y.) Pr. 335; *Jenkins v. Temples*, 39 Ga. St. 655; *Bunn v. Guy*, 4 East, 190; *Dendy v. Henderson*, 11 Exch. 194; *Nichols v. Stretton*, 10 Q. B. 346; 7 Beav. 42; *Whitaker v. Howe*, 3 Beav. 383; *Tallis v. Tallis*, 16 Jur. 746, note; 1 Smith's L. C. (8th ed.) 766; *Wiley v. Baumgardner*, 97 Ind. 69; *Aubin v. Holt*, 2 K. & J. 66.

⁴ *Baker v. Gordon*, 86 N. C. 116; *Isler v. Murphy*, 71 N. C. 436; *Moye v. Codgill*, 66 N. C. 403; *Pain v. Pain*, 80 N. C. 322. See *Hastings v. Whittley*, 2 Exch. 611; *Price v. Green*, 16 M. & W. 346; *Hitchcock v. Coker*, 6 Q. B. 438; *Ward v. Hogan*, 11 Abb. N. Cas. (N. Y.) 478; *Hayward v. Young*, 2 Chit. 407.

⁵ *Morgan v. Perhamus*, 36 Ohio St. 517. See also *Hall v. Barrows*, 33 L. J. Ch. 204; *Partridge v. Menck*, 2 Barb. (N. Y.) Ch. 101; *Millington v. Foy*, 3 Myl. & Cr. 338; *Whitaker v. Howe*, 3 Beav. 383; *Catt v. Tourle*, L. R. 4 Ch. App. Cas. 654; *Harrison v. Gardener*, 2 Mad. 198.

⁶ *Dean v. Emerson*, 102 Mass. 480; *Baumgarten v. Broadway*, 77 N. C. 8.

⁷ *Cook v. Johnson*, 47 Conn. 175; *Homer v. Graves*, 7 Bing. 735; *Mallan v. May*, 11 M. & W. 653; *Clark v. Crosby*, 37 Vt. 188.

⁸ *Doggett v. Ryman*, 17 L. T. n. s. 486; *Leather Cloth Co. v. Lorson*, 39 L. J. n. s. Eq. 86; *Newling v. Dobbell*, 19 L. T. n. s. 408.

⁹ *Hall's Appeal*, 60 Pa. St. 458.

¹⁰ *Gould, etc. Co. v. Todd*, 17 Hun (N. Y.), 548; *Thayer v. Younge*, 86 Ind. 259; *McClurg's Appeal*, 58 Pa. St. 51; *Wilkinson v. Colley*, 30 A. 286; 164 Pa. St. 35; 35 W. N. C. 177; *McCurry v. Gibson*, (Ala.) 18 So. 806; *Beatty v. Coble*, (Ind. Sup.) 41 N. E. 590; 142 Ind. 329; *Pickett v. Green*, 120 Ind. 584; 22 N. E. 737. Before a covenant or contract not to practise medicine, "in the neighborhood" can be enforced in equity, evidence must be given to show the extent of the practice sold to plaintiff. *McNutt v. McEwen*, 10 Phila. (Pa.) 112.

¹¹ *Richardson v. Peacock*, 26 N. J. Eq. 40. A bill alleging that complainant

§ 489. **Same — Careful Scrutiny of such Contracts.** — But since contracts in partial restraint of trade constitute and are allowed as exceptions to a prohibitory rule of public policy they will be strictly construed.¹ If a merchant, upon sale of his stock in trade and good-will, covenants not to carry on the same business at the same place or within a definite territory, and thereupon gives up his place of business, he will not be enjoined from afterwards soliciting and taking orders for others within the specified territory.² Nor will the prohibitory terms of such a contract extend to a member of a copartnership bound by it after a dissolution of the firm, unless so provided expressly or by clear implication.³ But a party who had covenanted not, directly or indirectly, either alone or in partnership, with or without the assistance of any other person, to set up or follow or practise any particular business, was held to have violated his covenant by engaging in the business in the capacity of assistant manager to another person.⁴ Since, however, such a contract has a tendency to deprive a party of his means of earning a livelihood, it will not be looked upon favorably; and before equity will enforce it by injunction it must be shown to be fair and reasonable in its terms. And where one physician, who alleged that he had paid to another \$150 to relinquish a practice worth \$5,000 per annum, and that the latter had resumed practice, asked for an injunction, it was held that it should be refused, and the parties left to assert their rights at law.⁵ The party seeking to

and defendant having dissolved partnership, the latter agreed, upon a consideration not to carry on the business in a certain county, but was about doing so in his wife's name, — *held*, to show ground for an injunction. *Cobbs v. Niblo*, 6 Ill. App. 60. See also *Eisel v. Hayes* (Ind. Sup.), 40 N. E. 119. But on the sale of a business and its good-will merely, without any restrictive agreement by the seller, he will not be restrained from establishing a rival business, and soliciting the customers of the purchaser. *Close v. Flesher*, (Com. Pl. N. Y.) 28 N. Y. S. 737; 8 Misc. Rep. 299. See also *Rock Island & P. Ry. Co. v. Dimick*, 144 Ill. 628; *Duff v. Russell*, 60 N. Y. Super. Ct. 80.

¹ *Goddard v. American Queen*, 59 N. Y. S. 46; 27 Misc. Rep. 482. See *Hoff v. Olson*, 101 Wis. 118; *Arena Athletic Club v. McPartland*, 58 N. Y. S. 477; 41 App. Div. 352.

² *Turner v. Evans*, 2 De G. M. & G. 740; *Bird v. Lake*, 1 Hem. & M. 338; *Clark v. Watkins*, 9 Jur. n. s. 142; *Allen v. Taylor*, 18 W. R. 888; s. c. 22 L. T. n. s. 651. See also *Stanley v. Pollard*, (Super. N. Y.) 25 N. Y. S. 766.

³ *Baker v. Pottmeyer*, 75 Ind. 451.

⁴ *Dales v. Weaver*, 18 W. R. 993; *Jones v. Havens*, 4 Ch. D. 636.

⁵ *Thayer v. Younge*, 86 Ind. 259. See also *Smith v. Brown*, (Mass.) 42

enjoin the violation of mutual covenants must show that he has performed, or tendered performance of the covenants binding on himself.¹

§ 490. **Same — Terms of Contract too General.** — A contract not to engage in business or pursue a trade or profession may be void because too general in its terms, thus constituting restraint of trade; or it may be void in part and valid in part, as where it contains two divisible clauses, one covering the whole state or country, the other restrictive as to a particular place or locality only.² In the first case no relief whatever can be granted in a court of equity against its violation, and in the latter only to the extent to which it is valid at law.

§ 491. **Violation of Contract of Sale of Good-will.** — An injunction will be granted to restrain the seller of the good-will of a business from breaking his covenant not to carry on the same, notwithstanding minor differences in name and manner of conducting it.³ The vendor of a business and the good-will thereof may, in the absence of express stipulation to the contrary, set up a business of the same kind either in the same neighborhood or elsewhere, and may publicly advertise the fact of his hav-

N. E. 101; 164 Mass. 584; *Saunders v. Taylor*, (Pa.) 5 Lack. Leg. N. 153; *Anderson v. Rowland*, 18 Tex. Civ. App. 460. Where a party to a contract, which stipulates the damages for its breach, practises medicine in a certain locality, contrary to the terms of the contract, the party injured has an adequate legal remedy by an action for the stipulated damages, and injunction to restrain the breach will not lie. *Martin v. Murphy*, (Ind. Sup.) 28 N. E. 1118.

¹ *Lawrence & Gilroy Dental Co. v. Gilroy*, 50 Ill App. 310.

² *Lange v. Werk*, 2 Ohio St. 520; *Green v. Price*, 13 M. & W. 695. In an action for injunction, the plaintiff alleged that he had purchased the business and good-will of the defendant, and that defendant had agreed, as part of the consideration, not to engage in the same business for a specified time, but subsequently did so. Defendant denied that his promise not to engage in the business constituted a part of the consideration. Plaintiff sustained his allegation by the affidavit of a witness. *Held*, that, upon the preponderance of proof in plaintiff's favor, the injunction was properly continued until the hearing. Such a contract is obnoxious to the rule forbidding contracts in restraint of trade. *Baumgarten v. Broadway*, 77 N. C. 8.

³ *Richardson v. Peacock*, 28 N. J. Eq. 151. Jacob S., having established a ready-made clothing business under the style of "Little Jake," sold the business to the plaintiff, with the benefit of the use of that name, and stipulated not to use it in a rival business. The plaintiff conducted the business under his own name. *Held*, that the plaintiff might enjoin the defendant from a violation of that agreement. *Grow v. Seligman*, 47 Mich. 607; s. c. 41 Am. Rep. 737.

ing done so; but he must not solicit the customers of the old business to cease dealing with the purchaser, or to give their custom to himself.¹ But the rule by which, in the case of a voluntary sale, the vendor of the good-will of a business is precluded from afterwards soliciting the former customers of that business, cannot be extended to the case of a compulsory alienation. The obligation enforced by the rule is purely personal, and not a mere incident to the transfer of property. Therefore the purchaser of the good-will of a business from a trustee in bankruptcy or liquidation has no right to restrain the bankrupt or liquidating debtor from setting up *bona fide* a fresh business and soliciting the customers of his former business, and it is immaterial whether the bankrupt has or has not joined in the conveyance of the good-will to the purchaser.² Thus, where the vendee of the machinery, fixtures, tools, and stock of a book-bindery, and of the vendor's "right, title, and good-will to the above," sought to enjoin the vendor from carrying on the same business in the town where the bindery was situated, and especially in the same street, it was held that an injunction was properly refused.³ In these, as in other cases of contracts restrictive of trade, the complainant will be required to make out a clear case, and to show that he has himself complied with the terms of the contract. Thus, where it appeared that complainant had not paid an overdue debt in compliance with the contract on his part, he was held not entitled to an injunction.⁴ And if it appear that the court has no power by injunction to prevent the doing of the acts alleged to constitute a violation of the contract, an injunction will not be granted.⁵

§ 492. **Use of Name in Trade.** — It is doubtful if under any circumstances a court of equity would enjoin a party from the use of his own name in trade, otherwise than in a trade-mark the ownership of which he has transferred to others. At any rate, so far as the adjudications have gone, preventive relief for that purpose has been uniformly refused. The mortgagee of

¹ *Labouchere v. Dawson*, L. R. 13 Eq. 322; *Leggott v. Barrett*, L. R. 15 Ch. Div. 306.

² *Walker v. Mottran*, L. R. 19 Ch. Div. 355; 27 Ch. Div. 145.

³ *Drake v. Dodsworth*, 4 Kan. 159.

⁴ *Hollis v. Shaffer*, 38 Kan. 492; 17 P. 86. See *Harkinson's Appeal*, 78 Pa. St. 196.

⁵ *Stull v. Westfall*, 25 Hun (N. Y.), 1.

stock-in-trade and good-will, and of the right to use a name, never having used the name and not intending to use it, was refused an injunction to restrain persons claiming under the mortgagor, from using the name.¹ And an employee of a company engaged in manufacturing plated ware, having covenanted not to engage, nor to allow his name to be used, in any business as manufacturer or seller of such goods, will not be enjoined from allowing rival manufacturers to use his name as a stamp on their goods, it not appearing that the name has any special or peculiar value as a stamp on such goods.²

§ 493. **Contracts for Service requiring Peculiar Skill.** — Ordinarily courts of equity refuse to enjoin the violation of restrictive covenants in contracts for personal services, the remedy at law being deemed adequate. It is otherwise, however, when the services contracted for require particular skill, or are unique, or extraordinary in their nature, such as those of eminent singers, actors, artists, and the like. While courts will not undertake to compel the specific performance of such contracts, they will restrain by injunction their violation, especially in the cases of singers and actors, by enjoining their singing or acting elsewhere or for others.³ Equitable relief against violations is usually in-

¹ *Beazley v. Soares*, L. R. 22 Ch. Div. 660.

² *Rogers Manuf. Co. v. Rogers*, 58 Conn. 356; 20 A. 467. See also *Scott Stamp & Coin Co. v. J. W. Scott Co.*, 15 N. Y. S. 325; 58 N. Y. Super. Ct. 379; *Banker & Campbell Co. v. Stimson*, (Sup.) 16 N. Y. S. 60.

³ *Lumley v. Wagner*, 1 De G. M. & G. 604; affirming s. c. 5 De G. & M. 485; *Metropolitan Exhibition Co. v. Ward*, 9 N. Y. S. 779; 24 Abb. N. C. 393; *Daly v. Smith*, 38 N. Y. Sup. Ct. 158; *Sanquirico v. Benedetti*, 1 Barb. (N. Y.) 315; *Pratt v. Montegriffo*, 10 N. Y. S. 903; 57 Hun, 587; *Burton v. Marshall*, 4 Gill (Md.), 487; *Duff v. Russell*, 14 N. Y. S. 134. See *Alleghany Base-ball Club v. Bennett*, 14 Fed. Rep. 257; *De Pol v. Sohlke*, 7 Robt. (N. Y.) 280. See also *Montague v. Flockton*, L. R. 16 Eq. 189; *Healy v. Allen*, 38 La. An. 867; *Daly v. Smith*, 49 How. Pr. (N. Y.) 150; *Webster v. Dillon*, 3 Jur. n. s. 432; *Fechter v. Montgomery*, 33 Beav. 22; *McCaull v. Braham*, 16 Fed. Rep. 37; *Caldwell v. Kline*, 8 Mart. n. s. (La.) 684; *Hahn v. Concordia Soc.*, 42 Md. 460; *Burton v. Marshall*, 4 Gill (Md.), 487. An injunction to prevent a *danseuse* from violating a covenant not to render her personal services as such to any person other than the plaintiff, was denied, where it did not appear that the plaintiff was suffering damages, as he had no establishment at the time where the defendant could dance. *De Pol v. Sohlke*, 7 Robt. (N. Y.) 280. Upon a contract, made by a husband for himself and his wife, that his wife should perform at the theatre of the manager named therein during a certain period, for a certain salary, a court of equity will not enjoin the wife from performing at any other theatre during the same period; nor the husband from

voked successfully in cases of contracts which require extraordinary mental or physical gifts or educational training of a high order, where there is a mutuality in the contract. Unless both parties are bound by the restrictive terms, equity will not interfere to prevent its violation by one of the parties.¹ But in a proper case a party will be enjoined from violating a contract to serve in a business capacity where his services are of peculiar value, and the damages for a violation not susceptible of estimation by any known standard, although the contract provides for the payment of a stipulated sum as a forfeit upon its violation.² No injunction will be granted, however, where the services contracted for are purely physical as distinguished from intellectual.³ And though an employee's familiarity with the business, and his knowledge of the customers acquired during the employment, have made his services of special value, an injunction will not issue against a violation of his contract to render such personal services as its manager may require, including travelling and acting as its secretary or other officer, such services not being so peculiar or individual that they could not be performed by any one of ordinary intelligence or fair learning.⁴

§ 494. **Disclosing Trade Secrets.** — An injunction will be granted against the vendor of a trade secret or secret receipt for

permitting her to change her residence; nor another manager from giving her employment, within the term, as an actress; nor can the specific execution of such a contract against the husband or wife be decreed; especially while the complainant is prosecuting a suit at law upon the contract. *Burton v. Marshall*, 4 Gill (Md.), 487. See *Sanquirico v. Benedetti*, 1 Barb. (N. Y.) 315; *Butler v. Galletti*, 21 How. (N. Y.) Pr. 465.

¹ *Hill v. Anderson*, 6 Ohio N. P. 111.

² *National Prov. Bank v. Marshall*, L. R. 40 Ch. Div. 112; *Cornwall v. Sachs*, 23 N. Y. S. 500; 69 Hun, 283; *Hoyt v. Fuller*, (Super. N. Y.) 19 N. Y. S. 962; *Canary v. Russell*, (Sup.) 30 N. Y. S. 122; 9 Misc. Rep. 558. The plaintiffs had purchased the copyright of and the right to use the name of the defendant in the publication of a work called "Beeton's Christmas Annual," and the defendant agreed to give his whole time to the service of the plaintiffs, and not to engage in any other business. *Held*, that the defendant must be restrained from advertising a rival work. *Ward v. Beeton*, L. R. 19 Eq. 207; *Strobridge Lithographing Co. v. Crane*, 58 Hun, 611; 12 N. Y. S. 898.

³ *Kemble v. Kean*, 6 Sim. 333; *Lumley v. Wagner*, 1 De G. M. & G. 603. See *Alleghany Base-ball Club v. Bennett*, 14 Fed. Rep. 257; *Jaccard Jewelry Co. v. O'Brien*, 70 Mo. App. 432; *W. J. Johnston Co. v. Hunt*, 21 N. Y. S. 314; 66 Hun, 504; *Burney v. Ryle*, 17 S. E. 986; 91 Ga. 701.

⁴ *Rogers Manuf. Co. v. Rogers*, 58 Conn. 356; 20 A. 467. See also *Sternberg v. O'Brien*, (N. J. Ch.) 22 A. 348.

manufacturing an article, who has contracted not to continue the use of the same in his business.¹ And one who, while in the employ of another, has agreed, in consideration of the employment, not to divulge certain secrets of manufacture nor to use them, may be enjoined from violating his agreement after leaving the employer's service.² He will not be enjoined, however, from making known, after the employment ceases, where his employer buys his materials, to whom he sells his goods and what he gets for them; and in the absence of anything in the agreement to the contrary, it will be deemed limited to the term of employment.³ On the same principle where the subscription agreement of a gold and stock telegraph company, incorporated under a statute, provided that no subscriber should sell or give away copies of the reports, in whole or in part, or permit any outside party to copy them, for use or publication, it was held that an injunction was properly granted to restrain a subscriber from violation thereof.⁴

§ 495. **Violation of Contracts concerning Real Estate—Erections.**—In a preceding section the rules governing the jurisdiction in enjoining the violation of contracts concerning the title and use of real estate were stated. It only remains to give a few instances wherein these principles have been applied. The most

¹ *Bryson v. Whitehead*, 1 Sim. & Stu. 74; *Peabody v. Norfolk*, 98 Mass. 452; *Taunton Manuf. Co. v. Cook*, 1 Boston L. Rep. 547; *Benwell v. Inus*, 24 Beav. 307; *Vickery v. Welch*, 19 Pick. (Mass.) 523; *National Gum & Mica Co. v. Braendly*, 51 N. Y. S. 93; 27 App. Div. 219; *C. F. Simmons Medicine Co. v. Simmons*, (C. C.) 81 F. 163; *O. & W. Thum Co. v. Tloczynski*, (Mich.) 72 N. W. 140; 38 E. R. A. 200; compare *Bell & Bogart Soap Co. v. Petrolia Mfg. Co.*, 54 N. Y. S. 663; 25 Misc. Rep. 66.

² *Salomon v. Hertz*, 40 N. J. Eq. 400; *National Gum & Mica Co. v. Braendly*, 51 N. Y. S. 93; 27 App. Div. 219; *Eastman Co. v. Reichenbach*, (Sup.) 20 N. Y. S. 110; *Fralich v. Despar*, 30 A. 521; 165 Pa. St. 24; *Little v. Gallus*, 38 N. Y. S. 487; 4 App. Div. 569.

³ *Salomon v. Hertz*, 40 N. J. Eq. 400. Defendant conveyed to plaintiff the right "in every way to introduce" a chemical preparation patented by defendant, including "the rights of the patents taken out," on condition that plaintiff should pay defendant a certain royalty, and employ him at a certain salary, so long as his services were rendered solely in plaintiff's interests and were satisfactory, and that plaintiff would employ agents, etc. Plaintiff having failed to perform specified conditions, defendant entered into a partnership with others to manufacture his preparation. *Held*, that an injunction to restrain defendant from revealing the secret of the preparation would be denied. *New York Chemical Co. v. Halleck*, 15 N. Y. S. 517. See also *Roosen v. Carlson*, 62 N. Y. S. 157; 47 App. Div. 638.

⁴ *Gold & Stock Tel. Co. v. Todd*, 17 Hun (N. Y.), 548.

common subject of covenant and contract is that of the building of houses and erection of other structures. It may be stated generally that a stipulation in a deed of a lot of land, if reasonable, prohibiting the erection or use by the grantee of buildings for stores, boarding-houses, hotels, or stables thereon without the consent of the grantor, is enforceable by injunction.¹ So where he builds within the limits of a private road in violation of covenants in the original deed to his grantor, equity will enjoin.² And where the grantees in deeds prohibiting the erection of a building, or projections therefrom, within a certain distance of a street, deliberately erect such projections, in knowledge of the prohibition, and of the opposition of the commonwealth, by which the deeds containing such prohibition were given, the attorney-general may proceed to compel their removal, by mandatory

¹ *Winnepesaukee Camp-Meeting Ass'n v. Gordon*, 63 N. H. 505; 3 A. 426; *Bimson v. Bultman*, 38 N. Y. S. 209; 3 App. Div. 198; *Ware v. Langmade*, 9 Ohio Cir. Ct. R. 85; *Id.* 2 Ohio Dec. 116; *Roberts v. Burke* (Pa.), 15 Montg. Co. Law Rep'r, 109. See also *Ranken v. Huskisson*, 4 Sim. 13; *Squire v. Campbell*, 1 Mylne & Craig, 480, 481; *Roper v. Williams*, 1 Turn. & Russ. 18; *Peek v. Matthews*, L. R. 3 Eq. 515; *Western v. McDermott*, L. R. 2 Ch. App. 72; *Mitchell v. Steward*, L. R. 1 Eq. 541; *Wilson v. Hart*, L. R. 1 Ch. App. 463; *Feilden v. Slater*, L. R. 7 Eq. 523; *Clements v. Welles*, L. R. 1 Eq. 200; *Lewis v. Gollner*, (N. Y. App.) 29 N. E. 81; *Woodward v. Clark*, 15 Mich. 104. But where defendants purchased a lot, with buildings on it, which had been erected years before in violation of a restriction in the deed; the grantor and his successors in interest were at all times in possession of the adjoining lot, but made no objections to the buildings, — *held*, that after such delay equity would not restrain the further maintenance of the buildings, but that plaintiff, who had succeeded to the grantor's interests in the adjoining lot, would be left to his remedy at law. *Orne v. Fridenberg*, (Pa. Sup.) 22 A. 832. See also *Higgins v. Westervelt*, (N. J.) 14 A. 118.

² *Gawtry v. Leland*, 40 N. J. Eq. 323. Where an estate was sold in lots, each lot consisting of a house and some adjacent land, and the fee was conveyed to the purchasers, who covenanted respectively with the vendors that the front or elevation of the houses should not be altered without the vendors' consent in writing, and that the premises should not be used as a public-house, beershop, temperance hotel, etc., Vice-Chancellor Sir W. P. Wood held, that the vendors had not waived their right to insist upon the observance of this covenant by forbearing for periods of six and nine months respectively from taking proceedings against two of the purchasers who sold beer upon their premises, but in such a way that the sale was not visible to occupiers of the other houses; and that the conduct of the plaintiff did not amount to such a degree of acquiescence and waiver as to preclude them from the right to an injunction restraining it. *Mitchell v. Steward*, L. R. 1 Eq. 541; see also *London & N. W. Ry. Co. v. Garnett*, L. R. 9 Eq. 26. Compare *Jones v. Bone*, L. R. 9 Eq. 674; *Cooke v. Chilcott*, L. R. 3 Ch. Div. 694.

injunction.¹ But injunction is not the proper remedy for violations of contracts for the construction and repair of buildings, the remedy at law being deemed adequate.²

§ 496. **Same — With Respect to Adjacent Lots on Common Plat.** — If the owners of a piece of land lay it out into house-lots, and agree among themselves that the same shall be occupied exclusively for dwelling-houses, and accordingly give deeds therefor, upon condition that no buildings shall be erected thereon except for dwelling-houses only, one who takes such a deed is bound in equity by the condition; and purchasers of others of the lots, whose estates will be injured by his violation of the condition, may maintain a bill in equity, without joining their grantors as plaintiffs, against him (if he has declined to join as a plaintiff) and his tenant.³ And where all the purchasers of lots of an estate were bound by restrictive covenants not to use their property for the keeping of a milk dairy thereon, an injunction was granted to restrain a breach of said covenants without regard to

¹ *Attorney-General v. Algonquin Club*, (Mass.) 27 N. E. 2, deciding also that the grantees, where the officers have expressed their opposition to the erection of such projections, cannot, after persisting in the erection, contend that the projections are not of sufficient importance to warrant a mandatory injunction or order for their removal. See also *Zipp v. Barker*, 55 N. Y. S. 246.

² *Great Southern Fire Proof Hotel Co. v. McClain*, (Com. Pl.) 4 O. L. D. 309; 3 Ohio N. P. 247. See also *McCurry v. Gibson*, 108 Ala. 451; 54 Am. St. Rep. 177; *O'Neal v. Hines*, 145 Ind. 32; *Gibson v. McClay*, 47 Neb. 900; *Cowan v. Fairbrother*, 118 N. C. 406; 54 Am. St. Rep. 733; *Carley v. Gitchell*, 105 Mich. 38; 55 Am. St. Rep. 428; *Newark Pass. Ry. Co. v. Inhabitants*, 53 N. J. Eq. 248.

³ *Parker v. Nightingale*, 6 Allen (Mass.), 341.

STIPULATION TO LEAVE COURT-YARD. — A parol agreement was made by proprietors of lots on one side of a street, that houses to be erected thereon should be set back eight feet from the street line, so as to leave a court-yard in front of each house; and in pursuance of said agreement a row of large and expensive houses, extending the entire length of the street, was erected and placed back eight feet. *Held*, that each house and lot, with respect to others, was a servient tenement to the extent of the court-yard; and that a subsequent grantee of one of the lots was properly restrained by injunction from building on the space so agreed to be left open. *Tallmadge v. East River Bank*, 2 Duer (N. Y.), 614.

NOT TO ERECT TENEMENT HOUSES. — It is no defence to an action by one lot-owner against another to enjoin the violation of a covenant in the latter's deed not to erect tenement houses on the premises, that tenement houses had been erected in the neighborhood, and that to specifically enforce the covenant would substantially deprive the defendant of the only use to which her lot could probably be put. *Amerman v. Deane*, 6 N. Y. S. 542.

the question of the injury caused thereby.¹ But an agreement in a lease not to let adjoining premises for the same purpose cannot be enforced by injunction against subsequent lessees thereof.² Any violation of the spirit of such a covenant will be enjoined to the same effect as if the violation were of its express terms; as where, under a contract not to erect buildings extending over a given line into the street, bay windows were constructed.³ But although the court has power to restrain parties from using a building which has been erected in a form that is in violation of

¹ *Hall v. Wesster*, 7 Mo. App. 56. See also *Crutchfield v. Wason Car Works*, 8 Baxter (Tenn.), 242.

² *Napa Val. Wine Co. v. Boston Block Co.*, 44 Minn. 130; 46 N. W. 239. Compare *Litka v. Wilcox*, 39 Mich. 94.

RESERVATION OF CHAPEL SITE. — A certain building site was marked on the map of a land association as "Chapel," on land which the plaintiffs, who were lot-owners, claimed to be "public grounds" under a dedication by the association. *Held*, that, irrespective of the public or private character of the land, the spot having been reserved by the owner of the fee as a building site, plaintiffs cannot enjoin the erection of a hotel thereon, without showing that the change in the use of it will abridge their enjoyment of the easement. *Johnson v. Shelter Island Grove & Camp-Meeting Ass'n*, 122 N. Y. 330; 25 N. E. 484.

STIPULATION NOT TO CONSTRUCT FLATS. — G., having a contract for the purchase of land on which to erect flats in the rear of houses owned by plaintiff and others, in consideration of a large advance on his contract price, transferred the contract to them, and agreed with plaintiff that he would not erect any flats in the immediate neighborhood. Soon afterwards he purchased other land in the vicinity, which, after commencing the erection of flats thereon, he transferred for a valuable consideration to his wife, who took with full notice of G.'s agreement with plaintiff, but continued the erection of the buildings. *Held*, that plaintiff was not entitled to an injunction to prevent their erection, as the agreement of G. was a mere personal agreement, not relating to any specific land, and therefore did not impose a covenant or equity which could be enforced against a subsequent grantee from him, even with notice of the agreement. *Lewis v. Gollner*, 14 N. Y. S. 362.

³ *Lord Manners v. Johnson*, L. R. 1 Ch. Div. 673. In this case it was *held*, first, that the bay windows were "buildings" within the meaning of the covenant, and the erection of them a violation of it; secondly, that there being a clear breach of covenant, the covenantees were entitled to their injunction without the necessity of showing damage; thirdly, that invasion of privacy constituted damage; fourthly, that the covenant being not to do an act the doing of which caused an invasion of privacy, it was not necessary for the covenant in terms to purport to preserve privacy. In *Collins v. Castle*, L. R. 36 Ch. Div. 243, it was *held* that the doctrine of *Nottingham Patent Brick & Tile Company v. Butler*, 15 Q. B. D. 261; 16 Q. B. D. 778, ought to be extended to cover the present case, and that the plaintiffs were entitled to restrain the defendant from building houses of less value than that specified in the covenant; also that the plaintiff in such a case is not obliged to prove damage in order to obtain an injunction.

the terms of a contract, or of an act of Parliament, yet a small excess in the height of a building beyond that to which it might lawfully have been raised, where no irreparable injury arises from such excess in height, would not be a case in which the court would interfere by interlocutory injunction to restrain the use of the building after it had been erected.¹

§ 497. **Same — With Reference to Encroachments upon Alley or Private Way.** — Either upon the ground of its constituting a nuisance or the violation of a contract affecting realty, an injunction will be granted to restrain a violation of a restrictive covenant in a deed against encroaching upon or obstructing a private alley or roadway. Thus, where proprietors of adjacent lands, by mutual agreement, definitely establish the boundaries of a private way previously laid out along their lines, and appropriate the strip of land embraced therein to be used as a perpetual easement, for the benefit of the abutting lands of each, and the common benefit of all, and, in pursuance of the agreement, fence to the boundaries so agreed upon, and thereafter improve and use the way thus established, the agreement may be enforced by injunction, at the suit of a purchaser from one of such proprietors, against a purchaser with notice from another.² And in another case it was held that under covenants in deeds to both parties that the land in question was to be used only as an alley, and that it was to be kept open for the mutual benefit of the owners of property on each side, defendants, having no right to obstruct the alley, had built a wooden frame entirely across it, and putting up hooks and slides of metal to hang and slide meat on, an injunction would issue in plaintiff's favor, though they were not using the alley at the time, and were not damaged by the obstruction.³ On the same principle injunction will be granted to prevent the erection of a statue upon a public street or square in violation of a contract.⁴

¹ *Dover Harbor (Warder) v. South Eastern Ry. Co.*, 9 Hare, 493.

² *Shields v. Titus*, 46 Ohio 528; 22 N. E. 717.

³ *Swift v. Coker*, 83 Ga. 789; 10 S. E. 442. At the time of purchase of a lot of land, it bounded on an alley eight feet wide, which the grantor promised to increase in width to sixteen feet, which he afterwards did. *Held*, that he should be enjoined from reducing the alley to the original width. *Bechtel v. Carslake*, 11 N. J. Eq. (3 Stock.) 500.

⁴ *Squire v. Campbell*, 1 Mylne & Craig, 459, 477 to 486; *Heriot's Hospital v. Gibson*, 2 Dow, 301, 304; *Beatty v. Kurtz*, 2 Peters, 566, 584.

§ 498. **Pertaining to Leases — In Favor of Lessor — Use of Premises.** — A tenant will be restrained from using the demised premises for any purpose which would be violative of the covenants of his lease.¹ Where a tenant has entered into a covenant which restricts him to a particular use of the demised premises, equity will restrain him from violating such covenant whether or not irreparable or serious injury would result from such violation.²

In order to entitle a landlord to an injunction against his tenant to prevent the doing of acts in violation of a contract or covenant, it is not necessary that the prohibited act amount to waste. It is sufficient if it be directly contrary to the tenant's own covenant, or even in contravention of an agreement which may be inferred from the course of dealing between the parties.³

¹ *Steward v. Winters*, 4 Sandf. (N. Y.) Ch. 587; *Dodge v. Lambert*, 2 Bosw. (N. Y.) 570; *Reade v. Armstrong*, 7 Ir. Ch. 375; affirming s. c. 7 Ir. Ch. 266; *Pugh v. Jayne*, 17 Leg. Int. (Pa.) 149; *Howard v. Ellis*, 4 Sandf. (N. Y.) 369; *Taylor's L. & T.* 691; *Trenor v. Jackson*, 40 How. Pr. (N. Y.) 389; s. c. 15 Abb. Pr. (N. Y.) 115; *Kerr on Inj.* 86; *Hunt v. Brown, Sau. & Sc.* 178; *Howard v. Ellis*, 4 Sandf. (N. Y.) Ch. 369.

² *De Wilton v. Saxon*, 6 Ves. 106; *Cregan v. Cullen*, 16 I. Ch. Rep. 339; *Bryden v. Northrup*, 58 Ill. App. 233; *Heidorn v. Wright*, (Super. Ct. Cin.) 6 Ohio Dec. 315; 4 Ohio N. P. 235; *Rockafellow v. Hanover Coal Co.*, (Pa. Com. Pl.) 12 Pa. Co. Ct. R. 241; *State Bank of Nebraska v. Rohren*, (Neb.) 75 N. W. 543; *Star Brewery Co. v. Primas*, 59 Ill. App. 581; *Fielden v. Slater*, L. R. 7 Eq. 523; *Hunt v. Browne, Sau. & Sc.* 178; *Barrow v. Richards*, 8 Paige (N. Y.), 357; *Att.-Gen. v. Sheffield Gas Co.*, 3 De G. M. & G. 321; *Seymour v. McDonald*, 4 Sandf. (N. Y.) Ch. 503; *Doran v. Carroll*, 11 I. Ch. Rep. 379; *Blagrove v. Blagrove*, 1 De G. & Sm. 252; *Lambert v. Lambert*, 2 I. Eq. Rep. 210; *Gilfilan v. Norton*, 6 Robt. (N. Y.) 546; *Kimpton v. Eve*, 2 Ves. & B. 352; *Kemp v. Sober*, 1 Sim. n. s. 520; *Longhurst v. Dixey*, Toth. 255; *Tipping v. Eckersly*, 2 Kay & J. 264; *Wilds v. Layton*, 1 Del. Ch. 226; s. c. 12 Am. Dec. 91; *Frank v. Brunneman*, 8 W. Va. 462; *Altman v. Royal Aquarium Soc.*, 3 Ch. D. 228; *Niagara Bridge Co. v. Great Western R. Co.*, 39 Barb. (N. Y.) 212; *Hodson v. Coppard*, 29 Beav. 4; *Parker v. Whyte*, 1 Hen. & M. (Va.) 167; *Clements v. Welles*, L. R. 1 Eq. 200.

³ *Frank v. Brunneman*, 8 W. Va. 462; *Parker v. Garrison*, 61 Ill. 250; *Douglass v. Wiggins*, 1 Johns. (N. Y.) Ch. 435; *Pratt v. Brett*, 2 Madd. 62; *Thomas v. Jones*, 1 Y. & C. 510; *Farrant v. Lovel*, 3 Atk. 723; *Wilkinson v. Rogers*, 12 W. R. 284; *Lewis v. Christian*, 40 Ga. 187; *Pulteney v. Shelton*, 5 Ves. 147; *Maddox v. White*, 4 Md. 72; *Steward v. Winters*, 4 Sandf. (N. Y.) Ch. 587; *Walton v. Johnson*, 15 Sim. 352. A temporary injunction will not be granted to restrain defendants from maintaining a sign erected by them on premises leased from plaintiffs, where there is nothing in the lease which forbids defendants to maintain such sign, and it does not appear that to allow the sign to remain will cause irreparable injury to plaintiffs. *Stirn v. Nash*, 12 N. Y. S. 431.

INFANT LESSEE. — In an action against an infant who had obtained a lease

One entitled under his lease to use a certain quantity of water, may be enjoined, at the instance of his lessor, from using more, there being no adequate method of measuring the excess used, and a complete remedy at law, therefore, not existing.¹ And injunction is the proper remedy to restrain the breach of a contract not to sell intoxicating liquors upon the granted premises in less quantities than five gallons.² And equity will enjoin in a proper case the abandonment of leased property by the lessee, and where the lessee of a road threatens to abandon its operation, in violation of the lease, the lessor will not be denied an injunction against abandonment because it will compel the performance of a series of acts involving the exercise of skill and judgment.³

§ 499. **Same — Assignment of Lease — Sub-letting.** — The relief will be granted against an assignee of the lease when the covenant to use the premises in a particular manner runs with the land as such assignee, though not named in the lease, holds subject to its conditions.⁴ The breach of a covenant in a lease

of a furnished house on an implied representation that he was of full age, — *held*, that the lease must be declared void, and possession given up, and that the defendant should be restrained by injunction from parting with the furniture; but that he was not liable for use and occupation. *Lempriere v. Lange*, L. R. 12 Ch. Div. 675.

¹ *Lawson v. Menasha Wooden Ware Co.*, 59 Wis. 393; s. c. 48 Am. Rep. 528.

² *Sutton v. Head*, 86 Ky. 156; 5 S. W. 410. See *Hall v. Solomon*, (Conn.) 23 A. 876, holding also that in an action by the grantors of certain premises to restrain a grantee from using it for a saloon, or for the sale of intoxicating liquor, under a parol agreement to that effect, the fact that parts of the land subject to such agreements had been resold without reference to the agreement will not defeat the grantors' right of action.

³ *Southern Ry. Co. v. Franklin & P. R. Co.*, 82 S. E. 485; 96 Va. 693; 44 L. R. A. 297.

⁴ *Mayor v. Pattison*, 10 East, 136; *Clements v. Welles*, L. R. 1 Eq. 200; *Bouwer v. Jones*, 23 Barb. (N. Y.) 153; *De Forest v. Byrne*, 1 Hilt. (N. Y.) 43; *Kemp v. Sober*, 1 Sim. n. s. 520; *Steward v. Winters*, 4 Sandf. (N. Y.) Ch. 587.

COVENANT AGAINST NOISOME TRADE. — A lease contained a covenant by the lessee and his assigns "not to use, exercise, or carry on upon the demised premises, or permit or suffer any part thereof to be occupied by any person who shall use, occupy, or carry on therein, any noisome or offensive trade," etc. E. purchased an under-lease of the premises with notice of the covenant in the original lease, and made a further sub-demise, containing a similar covenant to M. M., after being in occupation some months, began to carry on an offensive business on the premises. In an action by the original lessor, claiming an injunction against both E. and M., — *held*, reversing *Kekewich, J.*, that no injunction ought to be granted against E., there be

not to underlet will be restrained by injunction, where it appears that the damage arising from a breach cannot be accurately ascertained, and no facts are shown making it inequitable to enforce the covenant,¹ as where a sublessee sublets the leased premises to another person for a business other than that prescribed in the lease² and the occupation of leased premises under a void assignment of a lease will be enjoined.³

§ 500. **Same — Disturbance of Possession.** — Courts of equity are very reluctant to interfere with the exercise by the lessor of his right to recover possession of the demised premises either for breach of conditions in the lease or on account of the expiration of the term. And where a tenant, under a lease containing a privilege of renewal, holds over his term without any formal renewal, or any notice to the landlord that he intends to renew, equity will not enjoin the landlord from ejecting him, or require him to renew the lease. If, under the terms of the lease, and the facts of the case, the tenant is entitled to a renewal, his defence to an action at law for the possession is adequate and complete.⁴ In another case it was held that a lease of premises at a fixed yearly rent was not merged into a subsequent contract under which the tenant had the option of purchasing the premises at any time during his term; and that a tender of the purchase-price agreed on in the contract for the purchase, not accompanied

ing no evidence to show that E. had authorized or sanctioned M. to occupy the premises to carry on therein an offensive business; and that E. was not to be compelled by means of an injunction to bring an action of ejectment against M. The doctrine of *Tulk v. Moxhay*, 2 Ph. 774, explained. *Haywood v. Brunswick Building Society*, 30 W. R. 299; 8 Q. B. D. 403; and *Austerberry v. Corporation of Oldham*, 33 W. R. 807; 29 Ch. D. 750, followed; *Hall v. Ewin*, 36 W. R. 84. See also *Tod Heatly v. Benham*, 37 W. R. 38. Compare *Tritton v. Bankart*, 56 L. T. 306.

¹ *Sloan v. Martin*, 54 N. Y. Super. Ct. 87; *Barrinton Apartment Assoc. v. Watson*, 38 Hun (N. Y.), 545.

² *Wertheimer v. Hosmer*, 83 Mich. 56; 47 N. W. 47.

³ *Matthews v. Whitaker*, (Tex. Civ. App.) 23 S. W. 538.

⁴ *Appeal of Pittsburgh & A. Drove-Yard Co.*, 123 Pa. St. 250; 16 A. 625; 23 W. N. C. 89. Where summary proceedings have been commenced against a tenant for his removal, upon the expiration of an instrument purporting to constitute a tenancy at will, he may maintain an equitable action to cancel the instrument for fraud, and also to enjoin the summary proceedings. *Becker v. Church*, 115 N. Y. 562; 22 N. E. 748. On the other hand, the refusal of a tenant farming on shares to deliver to the landlord the latter's share, coupled with an apparent intention of appropriating the whole crop to his own use, is ground for an injunction and the appointment of a receiver. *Schmitt v. Cassilus*, 31 Minn. 7.

by the rent in arrear, was not sufficient to entitle the tenant to an injunction against summary proceedings instituted by the landlord to recover possession for the rent in arrear.¹ But equity will aid a tenant in preventing his landlord from breaking a covenant which will work a forfeiture of his (the tenant's) estate, although not made with the tenant, and even when a suit at law cannot be maintained on such covenant.² And where a county board of supervisors were proceeding to enter upon premises claimed under a renewal of a lease and payment of rent, the supervisors denying the receipt of rent or the passage of a resolution and payment, it was held, that a temporary injunction was properly granted, as otherwise the lessee would be remediless against the summary proceedings of the board.³

§ 501. **Same — Interference with Enjoyment of Possession.** — On like principle as that upon which injunctions are granted in favor of lessors to preserve the leased premises against destructive use, a tenant will be protected in a proper case against disturbance in the proper enjoyment of the demised premises by his landlord; and he will be entitled to an injunction against his lessor for breach of covenants which operate to the serious impairment or the destruction of the enjoyment of the leased premises.⁴ So where the defendants, owners of a public building, have contracted with the plaintiff, that he, renting a stall from them, shall have the exclusive right to exhibit and sell certain specified classes of goods, an injunction will lie against the defendants for permitting the exhibition and sale by other renters of stalls within the building, of goods so specified.⁵

¹ *Campbell v. Babcock*, 13 N. Y. S. 843.

² *Rogers v. Danforth*, 9 N. J. Eq. (1 Stock.) 389. See *Earle v. Gorham Manuf'g Co.*, (Sup.) 37 N. Y. S. 1037; 2 App. Div. 460.

³ *Landon v. Schenectady County Supervisors*, 24 Hun (N. Y.), 75.

⁴ *Rogers v. Danforth*, 9 N. J. Eq. 289; *Pokegama Sugar Pine Lumber Co. v. Klamath River Lumber & Improvement Co.*, 96 F. 34. An injunction was granted to restrain the owner of premises leased for ten years from erecting a building upon a portion of the premises in such a way as to seriously impair the lessee's use of the property. *Raband v. Frank*, 7 Mo. App. 64. A mandatory injunction was granted where the purchaser obtained possession by artifice, and erected the building in violation of a covenant, through fraudulent representations, and the vendor was without fault. *Roberts v. Burke*, (Pa.) 15 Montg. Co. Law Rep'r, 109.

⁵ *Altman v. Royal Aquarium Soc.*, L. R. 3 Ch. Div. 228. Compare *Clay v. Powell*, 85 Ala. 538; 5 So. 330. *Joint possession of safe.* — Where one of two tenants in common of a safe, a few days before the expiration of

§ 502. **Contract for Sale of Land — Suit for Purchase-money — Failure of Title.** — In case of an unexecuted contract for the sale of real estate, the vendee being entitled to that for which he contracted before he can be compelled to pay, if the vendor has no title at the time he agreed to convey, equity will enjoin him from proceeding at law upon the vendee's bond for the purchase-money.¹ And a person who does not reside, and has no property in the state, may be restrained from collecting a note given for land to which he has no title, although the grantee of the land has a remedy at law on a covenant of warranty.² So where a vendee gave a bond for the purchase-money of a tract of land, and the vendor at the same time gave a bond to make a valid title when the money was paid, it was held, that these were concurrent acts, and that, if the vendor attempted to collect the money on the bond for the price of the land, without making or tendering a valid title, the vendee was entitled to a preliminary injunction; and if a valid conveyance was not filed in court after the granting of the injunction, it should be continued to the hearing.³

§ 503. **Breach of Agreement to devise Lands.** — An agreement based upon a valid consideration whereby a party agrees to devise lands to another, may, if partly executed by such other party, be enforced by an injunction restraining the doing of that which would render performance impossible or without benefit. Thus, where plaintiff and defendant entered into a parol agreement by which defendant agreed to devise to plaintiff certain property, and upon the performance of which agreement defendant honestly and faithfully entered, and continued for several

the lease, renews it in his own name, the other properly invoked the equitable jurisdiction of the court to compel defendant to grant free access to the safe, instead of proceeding at law to assert title to the leasehold interest in the safe, or to obtain possession of its contents. *Hackett v. Patterson*, (Com. Pl. N. Y.) 16 N. Y. S. 170.

¹ *Dorsey's Admr. v. Hobbs*, 10 Md. 412; *Elliott v. Thompson*, 4 Humph. (Tenn.) 99; *Kroger v. Kane*, 5 Leigh (Va.), 606; *Senter v. Hill*, 5 Sneed (Tenn.), 505; *Clarke v. Hardgrove*, 7 Grat. (Va.) 399; *Gayle v. Fattle*, 14 Md. 69; *Truly v. Wanzer*, 5 How. (U. S.) 141; *Beale v. Seively*, 8 Leigh (Va.), 658; *Yonge v. McCormick*, 6 Fla. 268; *Swain v. Burnley*, 1 Mo. 404; *Bullitt's Exrs. v. Songster's Admrs.*, 3 Munf. (Va.) 55; *Bumpus v. Platner*, 1 Johns. (N. Y.) Ch. 213; *Abbott v. Allen*, 2 Johns. (N. Y.) Ch. 519; *Wilkins v. Hogue*, 2 Jones (N. C.) Eq. 479.

² *Green v. Campbell*, 2 Jones (N. C.) Eq. 446.

³ *Brittain v. McLain*, 6 Ired. (N. C.) Eq. 446.

years, and afterwards defendant sold and was about to convey the property to another, and the plaintiff brought an action to enjoin such conveyance, it was held that the agreement was binding upon defendant, and plaintiff was entitled to the relief asked.¹

§ 504. **Violation of Contract to furnish Water, Gas, etc.** — It needs no argument or authority to support the proposition that a violation of a contract to furnish a supply of water for use or consumption may inflict irreparable injury. As has elsewhere been shown,² courts of equity are extremely zealous in protecting riparian and water rights against infringement, and will in many instances grant preventive relief without proof of positive injury. On the same principle, evidence other than that necessarily apparent from a statement of the case is usually not required in support of an injunction against the attempted breach of a contract to furnish water. And as a court of law cannot prevent destruction of the owner's use of the water, he need not resort to his action for damages, but may seek relief in equity, and, the destruction being a palpable breach of contract, he need not show that irreparable injury would result.³ On the same ground of preventing irreparable injury, an injunction lies to prevent a water-works company from cutting off its water supply, where the consumer has offered to pay in advance the proper amount for the use of such water during the year, and the company claims a higher rate than is really true and exigible.⁴ And one who has a contract with a gas company to furnish him, free of charge, for twenty years, with gas for all ordinary purposes in his dwelling, including two street lamps in front of the house and a gas-log in the library, can have a temporary injunc-

¹ *Pflugar v. Pultz*, 43 N. J. 440; 11 A. 123.

² *Supra*, Chap. V.

³ *Last Chance Water-Ditch Co. v. Heilbron*, 86 Cal. 1; 26 P. 523; *Smith v. Birmingham Water-Works Co.*, (Ala.) 16 So. 123; *Cleburne Water, Ice, & Lighting Co. v. City of Cleburne*, (Tex. Civ. App.) 85 S. W. 733; *City of Des Moines v. Des Moines Water-Works Co.*, (Iowa) 64 N. W. 269; *Horsky v. Helena Consolidated Water Co.*, (Mont.) 83 P. 689.

⁴ *Earnst v. New Orleans Water-Works Co.*, 39 La. 550; 2 So. 415; *Stewart v. New Orleans Water-Works Co.*, Id. 416. One's verbal contract with a city water-works company for use of its pipes and plugs for sprinkling the streets is legal; and the officers' interference therewith, without due notice of terminating it, will be enjoined. *Callery v. New Orleans Water-Works Co.*, 35 La. An. 798.

tion against the company to prevent it from wholly cutting off his gas supply; and the fact that plaintiff has used the gas extravagantly is no reason for refusing the injunction, as it would be an irreparable injury to him to be deprived of it wholly.¹

§ 505. **Breach of Contract by Common Carrier.** — Where an express company had, under special contract, been for many years engaged in that business over the system of roads controlled by the defendant, and had built up a large and valuable business, and established valuable connections, all of which would be much depreciated if defendant should be allowed to refuse to further allow it to carry on such business over its line of road, it was held that for that reason an injunction restraining such action might be granted.² And a temporary injunction will be granted to enjoin a railroad company from charging an express company higher rates than are charged to other specified companies by the same railroad.³

§ 506. **Withdrawal and Abuse of License.** — The writ does not as a rule lie to restrain withdrawal of mere license. But where it is collateral to a contract based upon valuable consideration, the contract and the license being interdependent, or where the withdrawal without reasonable notice would cause irreparable injury, the licensee will be entitled to an injunction to prevent its withdrawal while the contract is in force. Thus, where a canal company, in consideration of the lessee's expenditure on certain ice-houses on the banks of the canal, granted a lease thereof, with license to take ice from a part of the canal, Lord Chancellor Campbell, affirming the decision of Vice-Chancellor Wood, held, that the license was not exclusive, but that it was a grant of sufficient ice to enable the lessee to fill the ice-

¹ *Graves v. Key City Gas Co.*, (Iowa) 50 N. W. 283; *Xenia Real Estate Co. v. Macy*, (Ind. Sup.) 47 N. E. 147; *School Dist. of Borough of Sewickley v. Ohio Val. Gas Co.*, 25 A. 868; 154 Pa. St. 539; *Rolfe v. Burnham*, 110 Mich. 660; *United States Electric Lighting Co. v. Metropolitan Club*, 6 App. D. C. 536; *Hagan v. Fayette Gas-Fuel Co.*, 81 Pa. Co. Ct. R. 503; 29 Pittsb. Leg. J. n. s. 229. See *Hendricks v. Hughes*, 117 Ala. 591.

² *Dinsmore v. Louisville, Cincinnati, etc. R. R. Co.*, 2 Fed. Rep. 465; 2 Flippin (U. S. C. C.), 672; *Camblos v. Philadelphia & Reading R. R. Co.*, 9 Phila. (U. S. C. C.) 411; *Wood Ry. Law*, p. 588. See *Northern R. R. v. Manchester & N. W. R. R.*, (N. H.) 81 A. 17.

³ *Southern Express Co. v. Memphis, etc. R. R. Co.*, 2 McCrary (U. S. C. C.), 570.

houses; and that, so long as the lessee was able and willing to take this quantity of ice, the lessors could not derogate from their grant by subsequent licenses which would interfere with it.¹ Independent of contract one may become vested under a license with an equitable right which will be sufficient basis for an injunction restraining its withdrawal.² Especially will relief be granted in such case against any interference with the enjoyment of the subject of the license by a third party having no rights in the premises. Thus where plaintiff's farm is irrigated by water flowing from a cistern placed by him on land owned and exclusively possessed by defendant's wife, and defendant without any authority from his wife stops such flowage, plaintiff is entitled to an injunction, though his right is only a license subject to revocation by defendant's wife.³ On like principle, and with a view to preventing fraud arising out of the relations created and existing under a license privilege, equity will interpose by injunction to prevent any abuse or excessive use of such

¹ *Newby v. Harrison*, 1 J. & H. 393; affirmed, 4 L. T. N. S. 424.

² *Legg v. Horn*, 45 Conn. 405. In this case it appeared that C., owning two dwelling-houses upon adjoining lots, and having the right to use the water from a spring upon land of another party for use at the houses, sold one of the houses to L. In the negotiation he had agreed that L. should have one-half the water from the spring, and that they should, at their joint expense, lay a pipe from the spring to a point near the houses, from which each should lay a pipe to his own house, at his own expense. This agreement was not put into the deed, nor in writing, but it had a controlling influence in inducing L. to purchase. The pipes were thus laid, at an expense to L. of \$100. Afterwards C. purchased the lot containing the spring, and some time after sold that lot, with his dwelling-house, to H., who bought with full knowledge of the agreement with L. as to the water and pipes. After his purchase, H. demanded payment of L. for the further use of the water, but L. continued to take it as before, claiming the right to do so under the agreement with C. H. forbade L. to take water from the spring, and finally cut the pipes on his own land. L. had used the water under the agreement for more than fifteen years from the time of the purchase. Upon a petition for an injunction against H. it was *held*, 1. That the agreement of C. with L. was not a mere license, but that L. acquired under it an equitable right. 2. That L., by his use of the water under a claim of right for fifteen years, had acquired a legal title to the easement. 3. That L. had a right to enter upon the land of H. to repair the pipes and put the spring in order. 4. That the remedy by action at law for damages was entirely inadequate, and a court of equity had jurisdiction. 5. That H. should be enjoined, not only from doing any act that should prevent L. from taking water from the spring, but from using the water in any manner that should deprive L. of the use of one-half of it.

³ *Emerson v. Bergin*, 71 Cal. 335; 12 P. 242. To same effect *Brauns v. Glesige*, (Ind. Sup.) 29 N. E. 1061.

privilege. Thus, where complainant had given to defendant permission to pile a small quantity of stones on complainant's lots, the defendant promising soon to remove them, but abused the privilege by piling boulders on the lots to the depth of twenty feet, it was held that complainant was entitled to a mandatory injunction to compel their removal.¹

§ 507. **Withdrawal by City of Permit to Railroad to build on Streets.** — Similar principles apply to a permit given by a municipality to a railway company to build in its streets as in the cases mentioned in the last preceding section; and where defendant city by ordinance granted plaintiff the right of constructing a railway over certain of defendant's streets, which right it afterwards revoked, and instructed its chief of police to prevent plaintiff from interfering with the streets in any manner, and plaintiff brought suit, and moved for an injunction during the pendency thereof restraining defendant from interfering with its work of constructing the railway, it was held that such motion was properly allowed, as a city cannot at pleasure rid itself of contract obligations.²

§ 508. **Contracts relating to Legal Proceedings.** — Aside from the jurisdiction to enjoin on equitable ground the institution and prosecution of actions at law, a court will, where the parties have entered into a contract on the same subject, restrain by injunction its violation, where the party injured by such violation is without means of adequate legal redress, or will otherwise suffer serious loss and inconvenience. Thus, an injunction was granted to restrain proceedings in the probate court by an heir-at-law and next of kin for the purpose of obtaining administration and opposing probate of a draft will, in contravention of an undertaking and deed by which defendants admitted the validity and confirmed the dispositions of the draft will, giving up all interest which they would have taken in the event of an intestacy.³ So where defendant instituted two suits against com-

¹ *Wheelock v. Noonan*, 53 N. Y. Super. Ct. 286. A parol license permitting a city to discharge the sewage from a particular district on private property does not authorize the discharge of the sewage from a much larger territory; and the licensor is entitled to an injunction against such increased discharge, and is not confined to a legal action for damages. *New York Cent. & H. R. R. Co. v. City of Rochester*, (N. Y. App.) 28 N. E. 416.

² *Asheville St. Ry. Co. v. City of Asheville*, (N. C.) 14 S. E. 316.

³ *Wilcocks v. Carter*, L. R. 10 Ch. 440.

DISMISSAL OF SUIT. — Where A., upon a good consideration, gave to B.

plainant for the same cause of action, one in Georgia and one in New York, and recovered judgment in both, and complainant paid the Georgia judgment, upon the assurance of defendant that the suit in New York, which was then pending, would be abandoned, both parties being citizens of Georgia, an injunction was granted restraining the enforcement of the judgment obtained in New York. The court considered that although the courts of Georgia had no power to restrain by injunction the proceedings of a court in another state, they had power to restrain the personal action of a citizen of Georgia.¹ And where the court has enjoined a defendant from any proceeding not in accordance with a contract set up by the plaintiff, it may order him, notwithstanding he has perfected an appeal, to desist from a second suit in another court to set the contract aside; and this, although new parties are introduced.² And breach of a contract by a judgment creditor with one of the judgment debtors, to first levy upon and exhaust property of the other debtor before levying upon that of the one with whom the agreement was made, could properly be enjoined.³

§. 509. **Same — Mutual Covenants — Agreement to pay Mortgage.** — With a view to the prevention of circuitry of action and needless litigation equity will, where covenants, in form independent, are in fact part of the same transaction and mutual, restrain the collection of one upon the failure of the other.⁴ On the same principle, and also to prevent injury for which an action at law would afford no substantial redress, a vendee who has bought land subject to a mortgage, which the vendor has agreed to pay, and who has given his note for the purchase-money, is, when sued on such note, entitled to an injunction restraining the execution of judgment in such suit until the vendor has paid the mortgage debt, where a decree of foreclosure has been ren-

a power of attorney to prosecute a suit at law in the name of A., but for the benefit of B., B. indemnifying A. against all responsibility for the costs, — *held*, that a court of equity would enjoin A. from dismissing the suit. *Monroe v. McIntyre*, 6 Ired. (N. C.) Eq. 65. But equity will not restrain, by injunction, the assignor of an equitable claim from dismissing a suit at law, brought by the assignee in the name of the assignor. *Deaver v. Elder*, 7 Ired. (N. C.) Eq. 24.

¹ *Engel v. Scheuerman*, 40 Ga. 206.

² *French v. Shoemaker*, 12 Wall. 86.

³ *Gibson v. McClay*, (Neb.) 66 N. W. 851.

⁴ *King v. Lindsay*, 3 Ired. (N. C.) Eq. 77.

dered on the mortgage and the vendor is insolvent.¹ But on a bill by one in possession of land for the specific performance of an alleged agreement by the defendant to purchase the land at sheriff's sale on execution against the complainant and take a mortgage for the amount advanced by him to pay incumbrances, an injunction to stay proceedings to recover possession from the complainant will not be retained until the hearing, if the amount due is large in proportion to the value of the land, and the responsibility of the complainant is comparatively limited.²

§ 510. **Collateral Agreements pertaining to Negotiable Paper.** — The exercise of the jurisdiction to restrain threatened actions arising out of negotiable paper to which the maker or indorser has an equitable defence has been thoroughly discussed elsewhere.³ But independently of the jurisdiction in proper cases to restrain actions at law, courts of equity often exercise the power to enjoin the violation of collateral agreements pertaining to notes, drafts, and other forms of commercial paper. Thus, where a negotiable note was given without consideration, upon an agreement that it should be given up to the maker upon a contingency which happened, and an action at law was brought by the payees against the personal representatives of the maker, it was held that the defendants at law were entitled to a decree perpetually enjoining the plaintiffs at law from proceeding in their action, and that the note be delivered up.⁴ So where the defendant, having brought suit against the complainant upon his three promissory notes secured by mortgage, afterwards agreed in writing that if complainant would bring him a note of a third party for a less sum payable in six months, he would discharge complainant from any further liability on the notes, but that defendant should still hold his claims on the mortgage, and the third party's note was accordingly delivered up to defendant, who, however, entered his action and obtained judgment on the notes, it was held that complainant could not have availed himself of the agreement as a defence to a suit at law, and that it afforded ground for relief in equity.⁵ But where one was

¹ *Gillett v. Sullivan*, 127 Ind. 327; 26 N. E. 827.

² *Clark v. Wood*, 6 N. J. Eq. (2 Halst.) 458.

³ *Supra*, § 65.

⁴ *Metler v. Metler*, 19 N. J. Eq. 457. See also *Clayton v. Lyle*, 2 Jones (N. C.) Eq. 188; *Bell v. Gamble*, 9 Humph. (Tenn.) 117.

⁵ *Hibbard v. Eastman*, 47 N. H. 507.

induced to indorse a note for the accommodation of the maker, by the assurance of the payee that it was a mere form, and that he should not be troubled about it, and afterwards suit was brought upon the note and judgment obtained by default against the indorser, he was held to be precluded from claiming afterward that the judgment was not binding.¹

§ 511. **Contract with Municipality.** — Equity will enjoin a city from disturbing rights granted by ordinance,² or contract.³ But as a rule one seeking an injunction against a municipal corporation must show that, without the relief, irreparable injury would result; otherwise he will be left to his legal remedies. Thus, where a city had filled in a cellar built underneath a sidewalk by an adjoining landowner, it was held that a bill by the latter, alleging that the city contracted to allow him to build and use such cellar, and praying an injunction and damages, could not be maintained where it failed to show any irreparable injury, or that there was no adequate remedy at law.⁴ Nor will the improvement of a street at the cost of abutting lot-owners be enjoined because the improvements were not made according to the contract awarded, nor on the grade established by a civil engineer.⁵

§ 512. **Negative Stipulations — General View.** — From what has preceded it is apparent that the terms against the violation of which preventive relief is most frequently sought are those negative in form. But there are a class of stipulations often found in commercial contracts so far negative in character that mere passiveness will constitute a violation, and positive action is required in order to obey an injunction forbidding such violation. Yet it is held that such injunctions need not be, in form, mandatory.⁶ A bill in equity to enjoin breach of a negative covenant, — for instance, that the covenantor will not manufac-

¹ *Roberts v. Miles*, 12 Mich. 297. But in *Weems v. Ventress*, 14 La. An. 267, it was held that, if the plaintiff came improperly into possession of a note, which was left conditionally with a third person, the defendant's remedy is by injunction, not by an appeal from the order of seizure and sale.

² *Springfield Ry. Co. v. Springfield*, 85 Mo. 674; *Chesapeake & P. Tel. Co. v. City of Baltimore*, (Md.) 45 A. 446.

³ *Newark Pass. Ry. Co. v. Inhabitants of East Orange*, (N. J. Ch.) 31 A. 722.

⁴ *Winter v. City Council of Montgomery*, (Ala.) 9 So. 366.

⁵ *McEneney v. Town of Sullivan*, (Ind.) 25 N. E. 540.

⁶ *Manhattan Mfg., etc. Co. v. New Jersey Stock Yard, etc. Co.*, 23 N. J. Eq. 161. Compare *Manhattan Mfg., etc. Co. v. Van Keuren*, Id. 251.

ture a certain species of leather-board, — may be maintained at the same time with a suit at law to recover damages for such breach.¹

§ 513. **Threatened Violation — What constitutes.** — What will justify a conclusion that a contract is about to be violated if acts constituting a violation have not already been done, is of course a question of evidence in each case. There is no doubt but that although no acts toward a violation have been done, a court is warranted in granting an injunction if convinced that a violation is fully intended by the defendant; and where a contract between two parties contains mutual stipulations, and one party performs his part, a court of equity may interfere, by injunction, to prevent the other party from violating the contract although it has not been actually violated, if the danger of its violation is imminent and actually impending.² But where plaintiff had an agreement with defendant, by which, at a future day certain, he was to enter into business with defendant and share the profits, and defendant, prior to that day, still conducting his business for his benefit, declared that he would repudiate this contract when the time of fulfilment should come, it was held, that the plaintiff had no grounds for demanding an injunction against defendant, before the arrival of the day fixed, and that the averment of the defendant's irresponsibility did not change plaintiff's rights.³ And as a matter of course an action to enjoin defendant from making certain uses of premises alleged to be unauthorized by the terms of a license under which defendant occupies them, will be dismissed as premature, where it appears that defendant had not even threatened to make any use of the premises further than the license warranted.⁴

§ 514. **Where Parties equitably Bound — Prevention of Fraud.** — There is a class of cases in which the violation of duties flowing from relations of the parties would operate fraudulently,

¹ *Bailey v. Collins*, 59 N. H. 459. A contract for the sale of chattels to the plaintiff contained an express negative stipulation not to sell to any other manufacturer. The court granted an injunction to restrain the breach of the negative stipulation, although the contract was one of which the specific performance would not have been granted. *Donnell v. Bennett*, L. R. 22 Ch. Div. 835.

² *Casey v. Holmes*, 10 Ala. 776.

³ *Redfield v. Middleton*, 7 Bosw. (N. Y.) 649.

⁴ *Vernam v. Palmer*, 5 N. Y. S. 71.

to prevent which, an injunction will issue, but which cannot with strict propriety be referred to any class of contractual obligations. Many of such cases come under the head of implied trust a violation of which will be enjoined in the exercise of the jurisdiction pertaining to trusts.¹ Thus, where an administrator sold the estate in remainder in certain land to the tenant in dower, and told the purchasers of the entire fee from said tenant that she had a good title, he was held enjoined from selling the land again.² So where a creditor, on receiving a judgment bond, agreed to collect the debt secured by it, ratably against the obligor and others, he was enjoined from proceeding to collect the debt of the obligors in the bond only.³ And where the plaintiff sent the defendant a draft telling him he might use the amount realized upon it if he would extend a certain overdue mortgage, which the plaintiff was under no personal liability to pay, and the defendant kept the draft but declined to stay his foreclosure suit unless he received more money on account of the mortgage, it was held: 1. That the defendant must accept the money on the terms offered, or not at all, and must be deemed to have accepted the condition. 2. That the plaintiff was not to be driven to his remedy at law, but might enjoin the foreclosure suit.⁴

§ 515. **Same — Further Illustrations.** — Many more instances

¹ *Maier v. Garry*, 84 N. Y. S. 363; 87 Hun, 315. In this case it was held that an injunction restraining testator's executors from terminating or modifying a contract between plaintiffs and testator under which a business has been conducted for several years is properly continued *pendente lite* on a complaint, supported by affidavits, alleging that plaintiffs signed the contract on the express oral agreement of testator that he would provide by will that his executors could not exercise any power in the contract to terminate or alter it so long as plaintiffs complied with it.

² *Allen v. Morgan*, 61 Ga. 107.

³ *Briggs v. Low*, 4 Johns. (N. Y.) Ch. 22.

⁴ *Grinnan v. Platt*, 31 Barb. (N. Y.) 328. See also *Cregar v. Cramer*, 31 N. J. Eq. 375.

MONEY PAID UPON AGREEMENT TO PROCURE CONVEYANCE. — A. sued B. on a promissory note for \$170. It appeared that the consideration for the note was an undertaking on the part of A., that C. should convey a certain tract of land to B., which A. alleged that C. owned, and for which, on the conveyance being made, B. made to A. a cash payment in addition to the note, fully covering the value of all C.'s interest in the land, which was but three-fifths of what A. had represented it to be. *Held*, that proceedings in the suit should be enjoined, and that without an offer on the part of B. to rescind the contract of sale. *Warren v. Carey*, 5 Ind. 319.

of the exercise of jurisdiction to prevent fraud by violations of implied trust and the equitable rights of parties might be given. Injunction will lie to restrain an action on a contract delivered in violation of an agreement to hold it in escrow until certain changes in it have been made.¹ And persons who contribute to a fund, on condition that a literary and theological seminary shall be located permanently in a specified place, and in consideration thereof, and which is accordingly located there permanently, are entitled to an injunction to prevent an illegal and unauthorized removal of the seminary to another place.² So where plaintiff had made advances for the benefit of a vessel, and had taken an assignment of the master's lien on the freight therefor, and the owners of the vessel were insolvent, it was held a proper case for an injunction, and for the appointment of a receiver to collect such freight charges, notwithstanding the allegations of the answer and affidavits showed that the defendants had chartered the vessel from the owner for such voyage.³ On like principle an injunction may be maintained to prevent removal of property sold upon condition that the title shall not pass until the price is paid.⁴ But a bill filed by a creditor against his debtor, alleging in substance that the complainant fears and believes that it is the purpose of the defendant to perpetrate a fraud upon him, by placing his effects beyond his reach before the complainant can obtain a judgment on his claims, does not authorize the granting of an injunction, or the appointment of a receiver.⁵

¹ Wychoff v. Victor Sewing Machine Co., 43 Mich. 309

² Hascall v. Madison University, 8 Barb. (N. Y.) 174.

³ Sorley v. Brewer, 1 Daly (N. Y.), 79; 18 How. Pr. 276, 509.

⁴ Coe v. Johnson, 93 Ind. 418.

⁵ Hubbard v. Hubbard, 14 Md. 856. A party brought a bill to enjoin a bond, under a general allegation that it was obtained from him by fraud, but not calling upon defendant to answer in what manner he obtained the bond from him, or what consideration he gave for it. Defendant answered, denying the fraud. No evidence was introduced contradicting such denial, or establishing the fraud. It appeared that the bond was executed by the complainant, and was in the possession of the defendant. *Held*, that the complainant was not entitled to the relief sought. Cummings v. Harrell, 6 Ark. 308.

CHAPTER X.

PERTAINING TO CREDITORS AND TRANSFERS.

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| <p>§ 516. The Existence of Liens and Conflicting Claims the Usual Reason for interfering.</p> <p>517. Relief not usually granted to Creditors prior to Judgment.</p> <p>518. Special Circumstances authorizing Departure from Rule.</p> <p>519. Distinctions further explained.</p> <p>520. Statutory Modifications of General Rule.</p> <p>521. Other Cases in which the Rule does not apply.</p> <p>522. Where Complainant holds Lien.</p> <p>523. Same — Fraudulent Connivance of Agent.</p> <p>524. Same — In Aid of Execution and Attachment.</p> <p>525. Transfer <i>pendente lite</i> — Real Property.</p> <p>526. Conveyance of Real Property — Equitable Lien.</p> <p>527. Transfer of Personalty <i>pendente lite</i> — Insolvency Proceedings.</p> <p>528. In Aid of Liquidation.</p> <p>529. Same — Other than Creditors' Actions.</p> <p>530. Creditors seeking Undue Advantage by Action.</p> <p>531. Same — Creditors residing in Different States — Bankruptcy Proceedings.</p> <p>532. Fraudulent Preferences.</p> <p>533. Same — Remedy extends to prevent Enforcement of Contracts and Conveyances by which Preference is given.</p> | <p>§ 534. Payment over to Preferred Creditors of Proceeds of Execution Sale — Conflict of Authority.</p> <p>535. Remedy not to be perverted — Election of Remedies.</p> <p>536. Articles of Special Value.</p> <p>537. Payment over of Money.</p> <p>538. Pertaining to Negotiable Promissory Notes.</p> <p>539. Same — Probable Injury must be shown.</p> <p>540. Corporate Stocks and Bonds.</p> <p>541. Same — Against the Corporation.</p> <p>542. Municipal Securities.</p> <p>543. Same — What Complainant required to allege.</p> <p>544. Transfer of Funds by Public Officers.</p> <p>545. Transfer under Execution.</p> <p>546. Same — Prejudice of Unpaid Creditors.</p> <p>547. Same — Personalty required to operate Railroad.</p> <p>548. Wife's Property.</p> <p>549. Joint Owners.</p> <p>550. Landlord and Tenant.</p> <p>551. Principal and Surety.</p> <p>552. Disposal by Will.</p> <p>553. Conditions of granting Relief — The Injury.</p> <p>554. Equitable Claim to Relief must be shown.</p> <p>555. Complainant must not be himself at Fault.</p> <p>556. Remedy at Law.</p> |
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§ 516. The Existence of Liens and Conflicting Claims the Usual Reason for interfering. — The most important and the usual reason for interfering by injunction to prevent transfer of property, whether upon application of creditors or of others, is the preservation of a lien which would otherwise be defeated and lost, to

the irreparable injury of the owner of the lien. But the jurisdiction is by no means confined to cases of threatened irreparable injury, and an injunction will often be granted on the ground of preventing a multiplicity of suits likely to result from conflicting claims to the property forming the subject of the application.

§ 517. **Relief not usually granted to Creditors prior to Judgment.**— Mere general or contract creditors have no such interest in or claim upon the property of their debtors as will warrant an injunction in their behalf to restrain a transfer and disposal by such debtors of their property; and in the absence of statutory provisions on the subject, or facts giving jurisdiction on other and independent grounds, equity will not, at suit of a creditor who has not reduced his claim to judgment, interfere to restrain a debtor from making any disposition of his property which he sees proper to make.¹ But after a creditor has instituted and prosecuted an action on his claim to judgment equity will enjoin on his behalf the debtor defendant from making any disposition of his property with intent to defeat or delay the collection of the judgment, or to give a preference to a portion of his creditors over the others.² It is observable, however, that these rules have been so often relaxed, either upon distinct equitable grounds or under statutes, that the exceptions to them are in some states of more importance than the rules themselves.

§ 518. **Special Circumstances authorizing Departure from Rule.**— The rule stated in the preceding section with reference to cred-

¹ *Mayer v. Wood*, 56 Ga. 427; *Kimbrell v. Walters*, 86 Ga. 99; *Rich v. Levy*, 16 Md. 74; *Balls v. Balls*, 69 Md. 388; *Wiggins v. Armstrong*, 2 Johns. Ch. 144; *Holdrege v. Gwynne*, 3 C. E. Green, 26; *McGoldrick v. Slevin*, 43 Ind. 522; *Mills v. Northern R. Co.*, L. R. 5 Ch. 621; *Crowell v. Horacek*, 12 Neb. 622; *Angell v. Draper*, 1 Vern. 399; *Shirley v. Watts*, 3 Atk. 200; *Bennett v. Musgrave*, 2 Ves. 51; *Phelps v. Foster*, 18 Ill. 309; *Bigelow v. Andress*, 31 Ill. 322; *Rhodes v. Cousins*, 6 Rand. 188; *Buchanan v. March*, 17 Iowa, 494; *Moran v. Dawes*, Hopk. (N. Y.) 365; *Candler v. Pettit*, 1 Paige (N. Y.), 168; *Mittnacht v. Smith*, 17 N. J. Eq. 259; *Power v. Alger*, 13 Abb. (N. Y.) Pr. 284; *Campbell v. Ernest*, (Sup.) 16 N. Y. S. 668. A married woman cannot arrest the sale of her husband's property seized in execution, on the mere ground of preference over the seizing creditor. *Marot v. Farriere*, 18 La. An. 665. The insolvency of a debtor, simply, and without some other equitable cause, is not a sufficient ground for the issue of an injunction at the suit of his creditor. *Pensacola, etc. R. R. Co. v. Spratt*, 12 Fla. 28.

² *Hyde v. Ellery*, 18 Md. 496; *Brall v. Shaul*, 18 W. Va. 258; *Witmer's App.*, 45 Pa. St. 455.

itors before judgment does not apply where special circumstances exist under which to deny relief would operate to deprive a party of a right or preference secured by superior diligence, as where he is entitled to a lien which would otherwise be defeated, or where the relation he holds is in some respects that of a *cestui que trust*, and that of the defendant, a trustee. It cannot therefore be stated as an unqualified rule that equity will not enjoin a transfer of personal property.¹

The only grounds on which injunctions are granted against third persons in possession of personal property, and ostensibly its rightful owners, upon an *ex parte* application, is for the protection of the fund or property, when shown to be in danger without this interposition.² And in the absence of qualifying and exceptional circumstances, or unless it becomes proper in order to prevent a breach of trust, a creditor has no such certain claim upon the property of his debtor as to entitle him to an injunction to restrain the latter from disposing of it until a judgment has been obtained against him.³ Any other rule would lead to an unnecessary, and perhaps a fruitless and oppressive, interruption of the exercise by the debtor of his rights. On this principle it is held that a stranger to the title to real estate, though in possession, cannot go into equity and enjoin the purchasers and owners thereof from setting up and enforcing their title, on the ground that it was fraudulently obtained.⁴ And since there is no right to enjoin the debtors themselves from parting with their property, an injunction will not lie against a creditor holding real

¹ *McFarland v. Dilly*, 5 W. Va. 135. The power of a court of equity to restrain by injunction the transfer of title of personal property, determined, in cases depending upon particular facts. *Johnson v. Connecticut Bank*, 21 Conn. 148; *Canal Trustees v. Dews*, 11 Ill. 592; *Smith v. Gibbs*, 44 N. H. 336. Where an injunction has been granted to prevent the defendant from dealing with the property in question during the suit, on a bill for the specific performance of a contract to convey the property, an objection that time is of the essence of the contract will not avail the defendant to dissolve the injunction. *Huffman v. Hummer*, 17 N. J. Eq. 263.

² *Thayer v. Smith*, Harr. (Mich.) 480. See *Hickman v. Hickman*, (Tex. Civ. App.) 27 S. W. 31; 5 Tex. Civ. App. 99. Equity will enjoin the threatened wrongful liberating, by one who is insolvent, of logs confined by a boom. *Milan Steam Mills v. Hickey*, 59 N. H. 241.

³ *Wiggins v. Armstrong*, 2 Johns. (N. Y.) Ch. 144; *Angell v. Draper*, 1 Vern. 399. See also *Bennett v. Musgrave*, 2 Ves. 51, and *Batch v. Wastall*, 1 P. Wms. 445, and cases cited.

⁴ *Treadwell v. Payne*, 15 Cal. 496.

estate as security, restraining him from restoring it after his claim is satisfied.¹

§ 519. **Distinctions further explained.** — As illustrating the facts which will bring a case within the exception to the general rule, a party holding a junior lien is entitled to an injunction restraining a sale of the property under a senior lien, which he alleges in his petition has been paid, notwithstanding his lien has not been reduced to a judgment. If he were a general creditor the general rule would apply.² And where a creditor of an estate, who had neither filed his claim with the executors nor established it by an action at law, but whose claim had been recognized by the executors by making payment thereon, filed a bill in equity, after the period for presentation of claims had expired, alleging that the executors had a large amount of assets on hand out of which he was entitled to be paid, and that they were disposing of them in fraud of his claim, and prayed for an injunction, and a preliminary injunction was granted, it was held, the preliminary injunction would not be dissolved on motion for want of equity, but would await the final hearing of the bill.³ The distinction may be further illustrated by reference to a case where a clerk has embezzled the goods of his employer, and converted them into money, and has the money on deposit in a bank to his own credit. Under these circumstances an injunction will not lie to restrain him from disposing of it, although he has no other property, and is about to leave the jurisdiction, nothing being positively averred which would justify a *ne exeat*. If the bill averred that the money was that of the plaintiff, an injunction might be granted.⁴ Nor will equity interfere to impound property or tie up interests after an execution sale thereof, in order to establish a lien thereon

¹ *Kimbrell v. Walters*, 86 Ga. 99; 12 S. E. 305. The provisions of Ga. Code, 3149 a, authorizing an injunction and receiver in case of non-payment by a trader of a matured debt, are in derogation of common law, and should be strictly construed. If the transaction out of which the debt arises concerns land, and, moreover, it does not clearly appear that the debt is due, the remedy is not available. *Ball v. Lastinger*, 71 Ga. 678.

² *Brigham v. White*, 44 Iowa, 677. An injunction against an executor to prevent his paying a distributive share of the decedent's estate to a certain party, was granted on the application of a creditor of that party, even though no judgment had been obtained by him, upon his showing that such party was hopelessly insolvent. *Lawson v. Virgin*, 21 Ga. 356.

³ *Emson v. Ivins*, 42 N. J. Eq. 277; 10 A. 877.

⁴ *McKenzie v. Cowing*, 4 Cranch (C. Ct.), 479.

under attachment proceedings that have not even reached a judgment.¹ And in a creditor's bill to reach chattels in the hands of a fraudulent vendee, and to enjoin their disposition, danger of irreparable loss is not shown by the insolvency of the debtor, but that of the fraudulent vendee should also appear in order to sustain an injunction.²

§ 520. **Statutory Modifications of General Rule.** — In several states the rule governing courts of equity on this subject has been materially altered by statutory provisions, under which any creditor of an insolvent debtor may file a bill setting up facts showing his insolvency or failing circumstances, and obtain the appointment of a receiver and an injunction restraining the debtor from further proceeding or interfering with the disposition of his effects. New York was the first state to enact such a law, but many states have followed its example, especially since the repeal of the National Bankrupt Act. Such statutes usually provide that an injunction may be issued and a receiver (usually the sheriff) appointed, before judgment, at the instance of any creditor, and against any debtor, to prevent a fraudulent disposition of the property, and "as a security for the satisfaction of such judgment as the plaintiff may recover."³

§ 521. **Other Cases in which the Rule does not apply.** — In the amplitude of its power to prevent fraud and irreparable injury, a court of equity will relax the general rule of non-interference and enjoin the foreclosure of a fraudulent chattel mortgage, at the instance of an attaching creditor of the mortgagor.⁴ And where one defendant purchased goods of plaintiff on credit by fraud, and transferred them to the other defendant to defraud plaintiff, and both were alleged to be insolvent, it was held that an injunction pending plaintiff's action for the price was authorized.⁵

After assignment for the benefit of creditors the latter have

¹ Rollins v. Van Baale, 56 Mich. 610.

² Fuller v. Cason, 26 Fla. 476; 7 So. 870.

³ Mitchell v. Betman, 25 Barb. (N. Y.) 408. An injunction order restraining A. from disposing of assigned property of B., under New York Code, sec. 299, cannot be made until A. has been summoned to appear and answer, as provided by section 294. King v. Tuska, 1 Duer (N. Y.), 685. C. C. P. § 604, subd. 2, construed, Campbell v. Ernest, (Sup.) 19 N. Y. S. 123.

⁴ Meacham Arms Co. v. Swarts, 2 Wash. 412.

⁵ Malcom v. Miller, 6 How. (N. Y.) Pr. 456.

an equitable lien upon the assets, to protect which they may enjoin any disposal of the debtor's property by the assignee which is not in accordance with the provisions of the statute or with the deed of assignment. Nor can a majority of creditors of an insolvent firm authorize the assignee to continue the business of the insolvent; neither can they defeat an injunction prayed for by a single creditor against the continuance of the business, it not being necessary that all creditors should join in a bill to enforce the trust of assignment; nor are they necessary parties defendant in proceedings taken by any creditor to enforce such trust.¹ But where the jurisdiction to grant injunctions under statutes concerning insolvency proceedings is of a limited nature, the courts vested with the jurisdiction have no power to grant injunctions in such proceedings, except in the instances provided for by statute, as when limited to cases where an inquiry is instituted to determine the insolvency of a debtor, and it is desired to protect the property in the mean time.² The rule is relaxed, however, sometimes under statutes, and in other instances without statutory provisions on the subject, in cases where plaintiff's claim is for tort, such, for instance, as malicious trespass.³

§ 522. **Where Complainant holds Lien.**—By whatever means a lien is acquired upon property, whether it be personalty or realty, and whether the lien be statutory, contractual, or equitable, an injunction will be granted to prevent any transfer of the property upon which it is held, which will have a tendency to defeat it, or will delay and hinder its enforcement, provided there is no legal remedy as effective as that by injunction in equity.⁴ Thus, on a bill setting forth that one of the defendants, by false pretences of solvency, had obtained goods on credit from complainants; that other defendants had assisted him in the deception, and afterward, by a fraudulent combination with him, to the prejudice of other creditors, and to cover antecedent claims of their own upon him, had obtained the goods from him and designed to sell them at auction at a great sacrifice; that complainant's remedy by replevin had been taken away, except as to a small portion of the goods,

¹ *Wilhelm v. Byles*, 27 N. W. 847; 60 Mich. 561.

² *Paul v. Locust Point Co.*, 70 Md. 288; 17 A. 77.

³ *Cottrell v. Moody*, 12 B. Mon. (Ky.) 500.

⁴ *Williams v. Harlan*, (Md.) 41 A. 51. See *Mullen v. Martin*, (Sup.) 40 N. Y. S. 725; 5 App. Div. 450; *Rolfe v. Burnham*, (Mich.) 68 N. W. 980.

by acts of the defendants, it was held a proper cause for an injunction.¹ And a bill setting out a promise by a defendant to give a mortgage of all his stock in trade, and charging that he now refuses to fulfil his promise and is selling his stock, and the complainant, being a large creditor, fears to lose his security, shows an equitable lien and will authorize an injunction.² But the vendor cannot enjoin the seizure and sale of property of his vendee when it is seized under execution as the property of a third person, on the ground that his obligation in warranty may attach. In such a suit the question of title to property is involved, and it, therefore, partakes of the nature of a petitory action (in Louisiana), which can only be maintained by the party in whom the legal title is vested.³

§ 523. **Same — Fraudulent Connivance of Agent.** — A party having property in the hands of an agent with power to sell, with the understanding that a lien shall be retained in the principal's favor for any unpaid part of the purchase-price, may enjoin any disposition of such property by a purchaser of the same which is designed to defeat the lien. An agent who was appointed to operate certain iron-works to secure the debts of certain creditors holding liens thereon, contracted with complainants for supplies, etc., which enabled him to make iron, and sold to them iron in payment therefor. After a part of the iron was delivered, such agent and secured creditors conspired together to prevent complainant from obtaining possession of the balance. The works were subsequently suspended, and the agent became insolvent. It was held that a bill alleging these facts, and praying injunction and receiver, should not be dismissed on demurrer.⁴

§ 524. **Same — In Aid of Execution and Attachment.** — An injunction is also the proper remedy to prevent a transfer of property designed and having the effect of defeating the lien of an execu-

¹ Hyde v. Ellery, 18 Md. 496. But where a judgment was rendered against certain mill property for taxes, from which judgment an appeal was taken, and a bond in double the amount of the judgment was given, it was held, that the owner of the property should not be restrained from removing it; that the object of the law giving a lien on the property was to secure the payment of taxes; and that, the bond standing in place of the property, it would be inequitable to interfere with the right to remove it. People v. Preston, 1 Idaho, N. S. 374.

² Trieber v. Burgess, 11 Md. 452.

³ Kelly v. Wiseman, 14 La. An. 661.

⁴ Smith v. McElwain, 57 Ga. 247.

tion or attachment upon it.¹ An injunction will issue, at the instance of an execution creditor, to restrain the debtor in execution and a prior execution creditor from selling or removing any of the personal property levied on, unless by sale under the execution, until the second execution is satisfied.² So where creditors of an absent debtor had obtained an attachment against his goods, and a brother of the debtor, to whom the property had been fraudulently conveyed, was disposing of the same, and preventing the creditors from seizing it under the attachment, it was held that the creditors had a lien under the attachment which could be enforced by an injunction, restraining the brother from disposing of the property, and removing it out of the jurisdiction of the court.³ But judgment creditors cannot enjoin the sale of their debtor's property under void chattel mortgages in the absence of proof of levy of their executions on such property.⁴

§ 525. *Transfer pendente lite*; *Real Property*. — Whether with a view to preserving liens, preventing total loss and irreparable injury, or avoiding a multiplicity of actions, an injunction will often be granted to prevent transfers of property pending an action at law involving title and interests in the same. An important reason for interposing by injunction to prevent transfers of real property *pendente lite* is the expense and vexation to which the plaintiff would be thereby subjected in making the vendee a party to the proceedings. Another ground is that though he may prevail in the action he may be embarrassed by such new outstanding title under the transfer; for although the maxim is, *pendente lite nil innovetur*, that maxim is not to be understood as warranting the conclusion, that the conveyance so made is absolutely null and void at all times, and for all purposes. The true interpretation of the maxim is, that the conveyance does not vary the rights of the parties in that suit, and that they are not bound to take notice of the title acquired under it; but with regard to them the title is to be taken as if it had never been executed.⁵ The public interest in putting an end to litigation has also

¹ *Gillette v. Murphy*, (Okl.) 54 P. 413. See *Moritz v. Kaliske*, (Sup.) 28 N. Y. S. 380; 31 Abb. N. C. 49.

² *Edgar v. Clevenger*, 2 N. J. Eq. (1 Green) 258.

³ *Falconer v. Freeman*, 4 Sandf. (N. Y.) Ch. 565.

⁴ *Glorieux v. Schwartz*, (N. J. Ch.) 28 A. 470.

⁵ *Story's Eq. Jur.* 908.

its importance among the reasons for interfering in such cases. If one party pending the suit could by conveying to others create a necessity for introducing new parties, suits would be indeterminate.¹ On this principle a proper case for an injunction is presented where land is levied on under execution, and claims are successively interposed and withdrawn; and equity will restrain the claimant from withdrawing his claim and the holder of the title from transferring the same, until the rights of the parties can be heard and adjudicated.² On the same principle pending an appeal from a judgment of the county court refusing to compel an administrator to execute a deed to a purchaser of land at administrator's sale, the administrator may be enjoined from making a second sale.³

§ 526. **Conveyance of Real Property; Equitable Lien.**—The cases in which injunctions are granted to restrain the alienation of property, are those where it is indispensable to secure the enjoyment of specific property, or to preserve the title to such property, or to prevent fraud or gross and irremediable injustice in respect to such property. An injunction will not be granted

¹ *Metcalf v. Pulvertoft*, 2 Ves. & B. 205; *Bishop of Winchester v. Paine*, 11 Ves. 197; *Gaskeld v. Durdin*, 2 Ball & B. 169; *Bishop of Winchester v. Beaver*, 3 Ves. 314; *Moore v. Macnamara*, 2 B. & B. 186. See *Wilhoit v. Cunningham*, 87 Cal. 453; 25 P. 675; *Sargent v. Cunningham*, Id. 677. Where the purchaser of real estate at sheriff's sale agreed to take it subject to a mortgage which would otherwise have been discharged, and afterward a *sci. fa.* was issued upon the mortgage, the court restrained him from selling or encumbering the property until the determination of the proceeding at law. *McCarthur v. Ashmead*, 2 Brews. (Pa.) 533. *Against special Commissioner.*—Pending suit to recover land which was in demand for settlement, the parties made a stipulation agreeing upon a special commissioner, subject to the approval of the court, to take possession of and sell, under the terms of the stipulation, all lands in dispute; and such commissioner had in the depository of the court a large sum, proceeds of such sales, which, under the stipulation, would be turned over to the defendant. The suit was dismissed without prejudice. *Held*, that, as the bill in a second suit to recover the land showed a primary equity in such lands and their proceeds, and the commissioner was a party defendant thereto, an injunction should be granted to prevent the transfer, payment, etc., of any moneys, credits, contracts, etc., derived from the sale of the lands, notwithstanding defendant's alleged pecuniary responsibility to pay any decree that might be obtained. *Northern Pac. R. Co. v. St. Paul, M. & M. Ry. Co.*, (Cir. Ct.) 47 F. 536; s. c. 49 F. 306.

² *Fields v. Ralston*, 30 Ga. 79. See also *De Lancey v. Piepgras*, 26 N. Y. S. 807; 73 Hun, 608, 610; *British & American Mortg. Co. v. Long*, 18 S. E. 165; 113 N. C. 123.

³ *Claridge v. Lavenburg*, (Tex. Civ. App.) S. W. 324.

to restrain the sale of land to which the petitioner has good title, when the sale can neither effect his title nor deprive him of possession.¹ But where a bill to foreclose a mortgage alleged that the mortgage, after being left at the recorder's office, had been lost, and had never been recorded, and that the defendant had threatened to sell the mortgaged premises, and prayed for an injunction to restrain any transfer, it was held that a case was made out for an injunction.²

§ 527. *Transfer of Personalty pendente lite; Insolvency Proceedings.* — While, as has been previously shown, some equitable grounds must be stated in a bill to warrant restraint upon the transfer of property prior to judgment, yet, where an action has already been instituted to test conflicting claims to specific property, an injunction may be properly granted to restrain transfers *pendente lite* even where the property involved is personalty.³ Interference in such cases is founded upon the prevention of multiplicity of suits, which would result if successive transfers were made pending the action, necessitating the bringing in of new parties or instituting new actions. And while, if specific property is not the subject of the litigation in aid of which an injunction is sought, an injunction cannot be granted to compel parties to hold goods, pending a trial at law, to satisfy a possible judgment,⁴ yet in an action to recover possession of personal property, an injunction may be granted in aid of the remedy.⁵

¹ *Carlin v. Hudson*, 12 Tex. 202.

² *Hawkins v. Cleremont*, 15 Mich. 511. The owner of a land office certificate gave a bond for a title to a part of the land to A., and afterwards assigned the certificate to B., with notice of the bond to A. The assignee of A.'s bond having reason to fear that B. would sell to a purchaser without notice, and disturb his possession, filed his bill to restrain B. from so doing; and it was so decreed. *Cupps v. Irvin*, 2 Blackf. (Ind.) 112.

³ *A. Smith & Sons Carpet Co. v. Skinner*, (Sup.) 86 N. Y. S. 1000; 91 Hun, 641; *Schoonover v. Condon*, 41 P. 195; 12 Wash. 475; *Bertha Zinc & Mineral Co. v. Clute*, (Com. Pl. N. Y.) 27 N. Y. S. 342; 7 Misc. Rep. 123; *Adams v. Ball*, 48 N. Y. S. 778; 24 App. Div. 69; *Hopper v. Morgan*, (N. J. Eq.) 42 A. 171. See also *Proctor v. Stuart*, 4 Okl. 679; *Waddingham v. Robledo*, 6 N. M. (Gild.) 347.

⁴ *Phelps v. Foster*, 18 Ill. 309. An injunction was refused to restrain the removal of a steamboat out of the state, pending an action under the act of 9th of April, 1811, for a forfeiture of the boat, because there was not a positive and direct charge that the boat would be eloiigned out of the jurisdiction of the court, without any intention to return it. *Livingston v. Gibbons*, 4 Johns. (N. Y.) Ch. 571.

⁵ *Furniss v. Brown*, 8 How. (N. Y.) Pr. 59; *Erpstein v. Berg*, 13 Id. 91; VOL. I. — 29

It is partly in pursuance of this policy and partly to preserve the equitable lien which exists in favor of the creditors upon the assets of the insolvent, that an injunction is granted to restrain interference with the possession of receivers in bankruptcy and assignees in insolvency proceedings. Nor is it any objection to granting an injunction and appointing a receiver, in a creditor's action, that another action, whether prior or subsequent, is pending on behalf of all creditors who may come in. But it is only after judgment in such action that other actions should be stayed.¹ A decree to account for the benefit of all the creditors, and in the nature of a judgment for all, being passed, an injunction will be issued on the motion of either party to stay all proceedings of any of the creditors at law.²

MacKaye v. Soule, (Super. N. Y.) 25 N. Y. S. 798. See also *Meroney v. Ass'n*, 112 N. C. 842; *Mallory v. Cowart*, 90 Ga. 600; *Davis v. Lassiter*, 112 N. C. 128. An injunction, — *held*, properly granted until the hearing to restrain the sale of land (under terms embraced in a contract of purchase) to secure payment, not of the original debt, but of a disputed portion of it, alleged to have been incurred by reason of the necessitous circumstances of the vendee (or mortgagor). *Tillery v. Wren*, 86 N. C. 217.

TO PREVENT TRANSFER OF WIFE'S PERSONALTY. — Although a husband, as guardian of his wife, was indebted to her in a much larger amount than the value of all his property transferred by him to her, where the facts indicate an intent to defraud creditors by such transfer, such as the transfer of personal jewelry and office furniture without change of possession, a temporary injunction restraining the transfer of the personal property by the wife will be continued pending final hearing. *Babcock v. Jones*, (Sup.) 17 N. Y. S. 67.

¹ *La Claise v. Lord*, 10 How. (N. Y.) 461. And see *Innes v. Lansing*, 7 Paige (N. Y.), 583.

² *Brooks v. Dent*, 4 Md. Ch. 473.

CREDITOR'S BILL — PRACTICE. — Where a creditor's bill is filed in chancery, upon return of execution at law unsatisfied, and defendant is let in to defend the action at law, the judgment being left to stand as security to plaintiff, the proper course is to stay proceedings upon the bill, to await the decision in the court of law, and to retain the injunction until such decision, unless defendant chooses to give sufficient security to pay whatever judgment may be recovered at law and costs. But if the injunction is dissolved on motion, complainant cannot, after a second verdict and a stay of proceedings upon such second verdict, until an application for a new trial can be made, take out a new execution upon his former judgment, and entitle himself to have his injunction renewed. *Drew v. Dyer*, 1 Barb. (N. Y.) Ch. 101. The evidence upon the application for injunction tending to prove fraud, but it appearing that a sale of the property in controversy will promote the interest of the parties, and that the trustee is solvent and capable, an order denying the injunction will be reversed, and the trustee restrained from disposing of the fund derived from such sale pending the action. *Roberts v. Lewald*, 108 N. C. 405; 12 S. E. 279.

§ 528. **In Aid of Liquidation.** — But in a proper case a party will be entitled to an injunction to prevent rather than aid liquidation through insolvency proceedings, as where a party undertakes under cover of insolvency proceedings to defraud his creditors. In such a case (affected however to some extent by statutory provisions on the subject), where the plaintiffs filed a complaint praying that a sale of choses in action, and an assignment for the benefit of creditors, made by an insolvent, be set aside, it was held that a preliminary injunction was properly granted restraining any transfer of the property until a decision should be made upon the merits.¹

§ 529. **Same — Other than Creditors' Actions.** — Injunction to restrain transfers pending actions at law are by no means confined to proceedings by existing creditors under insolvency or bankruptcy proceedings. Equity will interpose for the protection of rights which may ultimately be established without respect to the nature of the action, where interference is necessary and justified upon the grounds stated in the preceding sections. Thus, where a petitioner had obtained a decree *nisi* for dissolution of his marriage, and before an order could be obtained to vary the post-nuptial settlement the respondent was about to sell or otherwise dispose of some of the property, the court granted an injunction to restrain her from dealing with it.² And a defendant in replevin who has given a forthcoming bond and holds the property, pending a final determination of the claims of the parties, may have an injunction against the sale of the property on an execution against the plaintiff without alleging that the property belongs to himself.³ So an injunction was granted before answer forbidding two defendants to part with or interfere with goods which plaintiff alleged had been fraudulently obtained by one of them and sold by him by a fictitious sale to the other.⁴ But

¹ *Pelzer v. Hughes*, 27 S. C. 408; 3 S. E. 781. See *McDonald v. Bayne*, 12 N. Y. S. 772.

² *Noakes v. Noakes*, L. R. 4 P. D. 60.

³ *Cooper v. Newell*, 38 Miss. 316.

⁴ *Rateau v. Bernard*, 3 Blatchf. 244. But an injunction against the custom, house collector, in whose hands the goods were, was refused. *Id.* In an action by A. against B. and C., to recover for B.'s false representations, whereby A. parted with a lot of goods, and to restrain C. from disposing of goods assigned to him, pending the action, — *held*, that under New York Code, 604, subd. 2, an injunction should not be granted. The suit must be considered as one sounding in damages. *Jerome Co. v. Loeb*, 59 How. (N. Y.) Pr. 508.

where a bill is filed in aid of a suit at law, the bill falls with the action; and where an injunction was issued upon a bill in aid of an action of trover, it was held, that the whole proceedings were ended upon the death of the defendant, and that an injunctive order previously issued in the cause could not be the subject of contempt.¹

§ 530. **Creditor seeking Undue Advantage by Action.**—It is upon the same policy of preserving rights and parties *in statu quo* until an equitable adjustment can be had according to the amount of the respective claims of parties, and to preserve priorities obtained by superior diligence, that equity interposes to restrain actions at law by individual creditors seeking advantages to which they are not equitably or legally entitled. Nor is the power of the court of chancery to grant injunctions to restrain creditors from proceeding at law, after a decree for an account, confined to cases in which the application is made by the executor or administrator, but it extends to applications made by the heir, or by another creditor, or a common legatee, or by a residuary legatee.² And an injunction will be granted on the application of an administrator, upon the suit of the creditors of his deceased, where the affairs in administration are involved, complicated, and difficult.³ But a suit at law against the estate of a deceased debtor will not be restrained, by injunction, at the suit of his creditor on his own account only.⁴ And generally, in order to obtain an injunction against a suit to recover money on the ground that the complainant cannot safely pay, there being several claimants, he should file a bill of interpleader, and pay the debt into court for the party showing himself entitled thereto.⁵

¹ *Robertson v. Bingley*, 1 McCord, (S. C.) Ch. 383. Injunction will not issue to restrain the debtor from relying upon his discharge in bankruptcy, because if he pleads such discharge, complainant can then avail herself of the facts constituting the estoppel. *Wakelee v. Davis*, 44 F. 532; *Cornwall v. Davis*, Id. 533.

² *Boyd v. Harris*, 1 Md. Ch. 466. Where a creditor who holds as collateral security a note of a third party and a deed of trust given to secure it, purchases the trust property at his own sale for less than the amount due him, and afterwards resells it for enough to satisfy the debt, he will be enjoined from suing to recover the difference between the price he paid for said property and the amount of his debt. *Boardman v. Florez*, 37 Mo. 559.

³ *Berris v. Strochecker*, 21 Ga. 442.

⁴ *Simmons v. Whitaker*, 2 Ired. (N. C.) Eq. 129.

⁵ *Fowler v. Lee*, 10 Gill & J. 358. *Proof of claims.*—The supervisory power of the supreme judicial court in insolvency matters, given by Pub. St. Mass.

§ 531. **Same — Creditors residing in Different States — Bankruptcy Proceedings.** — It is on similar grounds as those stated in the preceding section that a court of equity enjoins creditors within its jurisdiction from obtaining an unfair advantage over either the debtor or other creditors, also within the jurisdiction, by transferring the litigation to the courts of another state. And it was accordingly held that the Supreme Court of Massachusetts had jurisdiction in equity, upon a proper case being made, to enjoin a citizen of that commonwealth from availing himself of an attachment of personal property in another state, in an action against a debtor who was insolvent under the laws of Massachusetts, and thus preventing the same from coming to the hands of the assignee; and that it was no objection that the action was commenced before the institution of proceedings in insolvency, if this was done with knowledge that such proceedings were about to be instituted, and with a view to obtaining a preference.¹ So a debtor may enjoin a resident creditor from attempting to enforce a claim in a foreign jurisdiction, where the attempt, if successful, would deprive the debtor of his exemption under the laws of his own state.² Upon like well-known principles a court of equity powers which has already acquired cognizance of a litigated matter and jurisdiction over the parties, will restrain a resort to bankruptcy proceedings where to allow them to do so would deprive a party of the benefit of an equitable priority in payment.³ But an injunction will not be granted to restrain creditors from prosecuting suits in another state to subject to execution a fund belonging to the debtor, who is a debtor of complainant in the injunction suit, though the debtor is insolvent, and the creditors are citizens of the state.⁴

§ 532. **Fraudulent Preferences.** — In the absence of statutes there is neither any rule of law against nor any remedy in equity to prevent a debtor preferring one or more creditors in payment or

c. 157, § 15, cannot be invoked to enjoin the proving of claims against an insolvent estate, or to decide the terms on which they may be proved, before they have first been presented to and passed on by the court of insolvency. *Proctor v. National Bank*, 152 Mass. 223; 25 N. E. 81.

¹ *Dehon v. Foster*, 4 Allen (Mass.), 545.

² *Wilson v. Josephs*, 107 Ind. 490; 8 N. E. 616.

³ See *Pusy v. Bradley*, 1 Thomp. & C. (N. Y.) 661.

⁴ *Commercial Soap Works v. F. A. Lambert Co.*, 21 So. 639; 49 La. An. 459.

security over others; and he may by so doing delay and hinder or entirely defeat one or a part, either by payment of other claims or conveying his property to other persons whether they be creditors or not. But to prevent such inequitable and essentially unjust results, statutes have been generally enacted not only placing all unsecured creditors upon an equal footing after actual insolvency, but vesting courts of equitable jurisdiction with power upon timely and proper application to prevent it by injunction. After this statement, it is scarcely necessary to add that the illustrations which follow are under such statutes, and are not the exercise of common-law equitable jurisdiction.

§ 538. **Same — Remedy extends to prevent Enforcement of Contracts and Conveyances by which Preference is given.** — If the relief were confined to the prevention of contemplated transfers by actual delivery, it would generally be of little value, for the reason that such transactions are seldom thought of or seriously contemplated until the existence of a state of insolvency unknown to creditors generally. Therefore courts of equity freely enjoin preferred creditors, even after the act is done or conveyance executed purporting to confer the advantage or priority, to prevent them from availing themselves of the fraudulent advantage thus sought to be given and acquired. Accordingly, a creditor's bill which charges that defendant fraudulently executed a bond upon which he was about to confess judgment in fraud of creditors, is a sufficient allegation to justify an injunction restraining an action on such bond.¹ And a creditor's bill which alleges an indebtedness to plaintiffs, and that notes were given therefor for the purpose of hindering plaintiffs in bringing their action, and to enable the debtor to execute a deed of trust, which plaintiffs ask to have adjudged fraudulent and void, states a cause of action sufficient to sustain an order restraining the defendant trustee from disposing of the property specified in the deed of trust pending the action.² So where a firm was hopelessly insolvent, owing various creditors, and incurred large debts, after having executed a written agreement to mortgage all their assets to a favored creditor, and afterwards executed the mortgage, and turned over

¹ *Mahaney v. Lazier*, 16 Md. 69. In such a bill the claim must be distinctly stated, and proper exhibits must accompany the bill. *Id.*

² *Roberts v. Lewald*, 108 N. C. 408; 12 S. E. 279. Compare *Dickson v. Mark Mayer*, 12 N. Y. S. 651.

to such creditor all their notes and claims, an injunction was granted to the other creditors restraining the preferred creditor from collecting the notes and securities, and from foreclosing the mortgage.¹

§ 534. **Payment over to Preferred Creditors of Proceeds of Execution Sale — Conflict of Authority.** — On the question whether another creditor or the assignee in insolvency representing him, having delayed making application for relief against the preferred creditor until the latter has reduced his preference claim to judgment and execution, is entitled to an injunction to prevent the officer from paying over to him the money realized on execution sale, is not entirely clear upon the authorities. But the preponderance of authority is to the effect that where the assignee for the benefit of creditors refuses on the request of a general creditor to bring an action to set aside a judgment fraudulently confessed by the debtor, the creditor, having brought suit for such purpose, may have an injunction *pendente lite* against the payment over of the proceeds of execution, such an action being in aid of the assignment, and to protect the trust fund.²

¹ *Fechheimer v. Baum*, 37 F. 167.

PRELIMINARY INJUNCTION PENDING ASCERTAINMENT OF FACTS. — On motion by M. for an injunction to prevent H. from settling his final account in the orphans' court, on the ground that he had concealed from M., M.'s priority over the other creditors, acquired by diligence, etc., no actual fraud was imputed to H., who asserted that he acted under the advice of his counsel and the surrogate. *Held*, that a preliminary injunction might issue, — H.'s duty to be determined after the evidence had been taken. *Miller v. Harrison*, 32 N. J. Eq. 76.

² *Riessner v. Cohn*, 1 N. Y. S. 161. See also *Keller v. Payne*, 1 N. Y. S. 138. *Contra*, *Lindam v. Lang*, 29 Ill. App. 188. In the last case plaintiffs had sold goods to a firm which afterwards confessed judgments in favor of the wife and mother-in-law of one of its members, and then made an assignment. After levy of execution on the confessed judgments, plaintiffs sued out an attachment, and brought suit to set aside the judgments and assignment because of fraud, and to enforce their claim. *Held*, that an injunction was properly granted restraining the sheriff from paying over any money realized under the execution, and the execution creditors from receiving such amount. Compare *Third Nat. Bank v. Clark*, 1 N. Y. S. 207.

WHAT CONSTITUTES PREFERENCE, BANKRUPT ACT. — An insolvent debtor procures a preference to a creditor, fraudulent within the meaning of the bankrupt act, where he makes affidavit to dissolve an injunction upon the taking of a judgment in a suit wherein the creditor has made an attachment, and where from the relationship between the parties, from the employment by the creditor of the debtor's attorney, from the absence of any valid special reason for suing when the suit was brought, rather than at any previous time, and

§ 535. **Remedy not to be perverted — Election of Remedies.** — Under color of aiding creditors and preventing fraudulent transfers the jurisdiction should not be extended to administering other remedies legal and equitable in the form of injunction, for instance, to regain possession of real estate though wrongfully in possession of a defendant.¹ And the remedy by injunction will not be allowed to be employed by one creditor against another to enable the former to himself obtain an undue advantage. And where a debtor had confessed judgment in favor of one or two creditors, and the other obtained an injunction to restrain proceedings upon such judgment on the ground that it operated to give a fraudulent preference, and while the injunction was in force brought an action at law to enforce his debt, he was, on application of the judgment creditor, put to his election to stay proceedings at law or dissolve the injunction.² For similar reasons the court in which an application is pending, under the statute "for the relief of insolvent debtors," may restrain one creditor from prosecuting supplementary proceedings against the assets of the debtor contained in his schedule, to prevent his gaining an unfair advantage over the other creditors.³ But where a creditor held several securities for an indebtedness, the court refused to enjoin him from proceeding to enforce one of them, to give the debtors opportunity to settle among themselves a question of priority as to their abilities.⁴

§ 536. **Articles of Special Value.** — Equity will sometimes enjoin the transfer of specific articles of personal property on account of their peculiar and special value to the owner. The jurisdiction is strictly confined to those cases in which the transfer would result in irreparable loss, as when the articles possess a relative or circumstantial value in the hands of the owner aside from the

from other circumstances, it is apparent that there was an understanding between two parties relative to the suit. *Rogers v. Palmer*, 102 U. S. 263.

¹ *Wehmer v. Fokenga*, (Neb.) 78 N. W. 28. See *Williams v. Harter*, 121, Cal. 47; *Finegan v. Eckerson*, 32 App. Div. 233; *Woods v. Early*, 95 Va. 307; *McIntosh v. Perkins*, (Mont.) 32 P. 653. The mere apprehension that the witnesses by whom defendant expects to establish his defence to a note may die or move away is not sufficient ground for restraining the transfer of the note, as the testimony of witnesses may be perpetuated under Code Civ. Proc. secs. 421-427. *Erickson v. First Nat. Bank*, (Neb.) 62 N. W. 1078.

² *Livingston v. Kane*, 3 Johns. (N. Y.) Ch. 224.

³ *Sexton v. Mann*, 15 Wis. 162.

⁴ *Goodwin v. State Bank*, 4 Desaus. (S. C.) 389.

general market value, and which could not, therefore, be ascertained by any recognized standard.¹ An injunction is the only form of relief which will protect one in the enjoyment of heirlooms and muniments of title to realty, against one who has surreptitiously or otherwise unfairly obtained possession of them, and is about to transfer them or place them beyond reach of the ordinary process of the courts. Even where the case is a proper one for a decree directing the delivery up of such property to the owner, a temporary injunction may be necessary to prevent its being disposed of, pending a final decree.² The latter is the ultimate form of relief in such cases. It is a very old head of equity jurisdiction, and may be traced back to so early a period as the reign of Edward IV.³

§ 537. **Payment over of Money.** — A party plaintiff is entitled to an injunction to restrain a third person, who is in possession of a sum of money in controversy, from paying it over to the defendant, where the plaintiff is in danger of losing it, owing to the claim of defendant and his insolvency.⁴ And a sheriff may be enjoined from paying over money received from the sale of an estate, under execution issued by individual creditors, where it appears that the complainants have a specific lien on the estate and a preference over individual creditors, and that the claim is pending and undetermined.⁵ But to entitle one to an injunction against the payment of purchase-money, it must appear either that the party has no remedy at law for a wrongful payment, or that the legal remedy is nugatory on account of the insolvency of the person to whom it is about to be paid. And on appeal from a judgment for defendants, in an action to restrain the county

¹ *Parsons v. Hartman*, (Or.) 37 P. 61; *Petty v. Dunlap Hardware Co.*, (Ga.) 25 S. E. 697; *Frederick County Nat. Bank v. Shafer*, 39 A. 320.

² *Ximenes v. Franco*, 1 Dick. 149; *Tonnins v. Prout*, 1 Dick. 887; *Eden on Injunct.* ch. 14, p. 313; *Church v. Haeger*, (Com. Pl. N. Y.) 33 N. Y. S. 47; *White v. Brady*, 92 Ga. 443; *Johnson v. Debary-Baya Merchants' Line*, (Fla.) 19 So. 640. See also *Osborn v. United States Bank*, 9 Wheat. 738.

³ *Mitford, Eq. Pl. by Jeremy*, 117 n.; *Armitage v. Wadsworth*, 1 Mad. 192.

⁴ *Denson v. Stewart*, 15 La. An. 456. See also *Roca v. Byrne*, (Sup.) 17 N. Y. S. 891; *Jones v. Jones*, 20 S. E. 870; 115 N. C. 209; *Dulaney v. Scudder*, 94 F. 6; 86 C. C. A. 52.

⁵ *Reed v. Dews*, R. M. Charl. (Ga.) 355. Where money paid into court pending a litigation is claimed by one not a party to the litigation, his proper remedy is by suit in equity in the same court, and he may have an injunction to restrain the withdrawal of the fund from the court, but not to prevent the entry of judgment in the original suit. *Mann v. Flower*, 26 Minn. 479.

judge acting for the county from paying over a certain fund to a defendant, and for a lien thereon, plaintiff is not entitled to an order restraining such payment pending the appeal where the county is solvent, as, if the money is paid over wrongfully, the county will still be liable.¹ Where, however, a party claims an interest in a judgment recovered in the name of another, he is entitled to an injunction to restrain the defendant in the action from paying the amount of his interest to the judgment plaintiff, without alleging the insolvency of the latter.² And where the petition prays for an injunction to restrain the defendant from paying over money held by him as trustee, and also for a decree that it be paid to the plaintiff, it is not sufficient to allege in the answer that the money had been paid to the *cestui que trust*, but it must be stated that it was so paid before notice of the injunction.³

§ 538. **Pertaining to Negotiable Promissory Notes.** — More than one reason usually exists for restraining by injunction the transfer of negotiable paper. As is shown elsewhere, the jurisdiction may be based on the prevention of a threatened action by an innocent transferee, to which complainant's defence would be unavailable;⁴ or on the fact that it is a violation of a collateral parol agreement between the parties.⁵ But in many cases it becomes necessary and entirely proper to enjoin the payment, as well as the transfer of negotiable securities, for the purpose of preventing the success of a fraudulent design. Thus, where possession of a promissory note, executed by a person since deceased, is gained by fraud, and allowed as a valid claim against the estate in the hands of the fraudulent holder, and opportunity given to prove title by the rightful owner is denied, equity will enjoin payment by the admin-

¹ *McFadden v. Owens*, 54 Ark. 118; 15 S. W. 84. See also *Burkhart v. Sanford*, 7 How. (N. Y.) Pr. 416; *Williams v. McCormack*, 7 Humph. (Tenn.) 308; *Thornton v. Thornton*, 68 N. C. 211.

² *Rawlins v. Bodie*, 33 La. An. 573.

³ *Hollis v. Border*, 10 Tex. 360.

⁴ *Supra*, § 65. See also *Burns v. Weesner*, (Ind. Sup.) 34 N. E. 10; *Thompson v. Flathers*, (La.) 12 So. 245; 45 La. Ann. 120; *Locke v. Locke*, (Mass.) 44 N. E. 346; *Hodson v. Glass Co.*, 156 Ill. 397; *Erickson v. Bank*, 44 Neb. 622; *Dickerson v. Bankers' Loan & Investment Co.*, 25 S. E. 548; 98 Va. 498; *Moomaw v. Fairview Cemetery Co.*, (Va.) 27 S. E. 469. In a suit to cancel a promissory note, an indorsee for collection should not, after the note is past due, be restrained from returning it to the owner, it not appearing that the owner is irresponsible, and the suit being notice to the world of plaintiff's claim. *New York Construction Co. v. Simon*, (C. C.) 53 F. 1.

⁵ *Supra*, § 522.

istrator until the question of title can be judicially determined.¹ So an injunction lies, when a vendor who has procured a sale of land by fraudulent false representations, is insolvent, and holds the purchaser's negotiable notes for the price; but it should be strictly restricted to prohibiting the vendor from assigning the notes or any judgment acquired thereon, and from selling under execution without giving a refunding bond.² On the ground of preventing circuitry of action, an action on a note, transferred overdue, pending a settlement of accounts between the maker and payee, will be enjoined.³ So where a person has negotiable securities in his possession, under a void contract, and is not of sufficient responsibility to answer for the value thereof, the negotiation of them may be restrained by injunction.⁴

§ 539. **Same — Probable Injury must be shown.** — The equitable grounds which will justify interference with the transfer of notes must exist at the time of the application for relief; and equity will not interfere to restrain the vendor from collecting or negotiating securities given for the price of land conveyed with full covenants of warranty, on account of alleged defects in the title not amounting to a total failure of consideration, where there has been no disturbance or eviction, and no suit is pending by an adverse claimant.⁵ Nor is a defendant in a suit upon a promissory note entitled to an injunction against such suit wherein he admits his indebtedness to the plaintiff, but avers that the plaintiff is insolvent, and that the defendant is liable as the plaintiff's surety, upon an overdue promissory note held by a third party; that a suit has been commenced to foreclose a mortgage given by the plaintiff to secure such note, and that the mortgaged property will prove insufficient to pay such note in full.⁶

¹ *McKinney v. Curtiss*, 60 Mich. 611; 27 N. W. 691. See also *Grier v. Flitcraft*, (N. J. Ch.) 41 A. 425; *Wilcox v. Ryals* (Ga.), 34 S. E. 575; *Hodson v. Glass Co.*, 156 Ill. 397; and note to *Erickson v. Bank*, (Neb.) 28 L. R. A. 577.

² *Bridges v. Robinson*, 2 Tenn. Ch. 720. See also *Zeigler v. Beasley*, 44 Ga. 56. Where loans of money upon collaterals are usurious, the borrower may maintain an action for the redemption of collaterals not necessary for the payment of the loans, and may ask an injunction restraining the collection or indorsement of the collaterals. *Bindford v. Boardman*, 44 Iowa, 53.

³ *Peck v. Wakley*, 1 McCord (S. C.) Ch. 43.

⁴ *Delafield v. State of Illinois*, 2 Hill (N. Y.), 159. See also *Bullock v. Winter*, 10 Ga. 214; *Belohradsky v. Kuhn*, 69 Ill. 547. An injunction in force against the negotiation of a note does not destroy its negotiability. *Winston v. Westfeldt*, 22 Ala. 760.

⁵ *Hile v. Davison*, 20 N. J. Eq. (5 C. E. Gr.) 228.

⁶ *Hopkins v. Fechter*, 47 Mo. 331.

§ 540. **Corporate Stocks and Bonds.** — Since certificates of stock in a private corporation though not strictly speaking commercial paper are usually transferable by assignment and delivery, and since a *bona fide* transferee is not bound by any mere equities which exist between the transferee and the corporation, or between the holder and an equitable owner, an injunction often becomes proper, upon one or more of the equitable grounds before stated in connection with negotiable paper, to restrain the transfer of such certificates. The power of courts of equity to interfere in such cases is well established.¹ Thus, for instance, when there is a controversy respecting the title to stock under different wills, an injunction will be granted to restrain any transfer *pendente lite*.² So in an action to cancel the subscription of complainants to the stock of a corporation on the ground that it was procured by false representations, and to obtain a return of the money paid for the stock, it is proper to restrain by injunction any disposition of the corporate property and the money paid for the stock pending such suit.³ And equity will interfere pending the settlement of a controversy concerning the title to stock between principal and agent,⁴ or where a trustee or agent attempts to transfer it for his own benefit and to the injury of the party beneficially entitled to it.⁵

§ 541. **Same — Against the Corporation.** — Nor is the jurisdiction confined to restraining holders of outstanding shares of stock. In a proper case it will be granted against a corporation, at the suit of parties having an equitable interest, to restrain a transfer by the corporation. And where a lien and power of sale upon and over the shares of stockholders are given by charter to a bank, for the security and satisfaction of debts due from the stockholders to the bank, a court of equity will enjoin a sale, or,

¹ See *Osborn v. Bank of United States*, 9 Wheat. 738; *McLure v. Sherman*, (C. C.) 70 F. 190; *Wanner v. Powell*, 75 Ill. App. 297; *Davis v. San Antonio & C. S. Ry. Co.*, 44 S. W. 1012. See also *Stockton v. Tobacco Co.*, 55 N. J. Eq. 352.

² *King v. King*, 6 Vesey, 172; *Barth v. Union Nat. Bank*, 67 Ill. App. 131; *Weston v. Goldstein*, 57 N. Y. S. 311; 39 App. Div. 661.

³ *Sherman v. American Stove Co.*, 85 Mich. 169; 48 N. W. 537; *Hower v. Weiss Malting & Elevator Co.*, (C. C. A.) 55 F. 356.

⁴ *Chedworth v. Edwards*, 8 Ves. 46.

⁵ *Osborn v. Bank of United States*, 9 Wheaton, 844, 845; *Stead v. Clay*, 1 Sim. 294; *Rogers v. Rogers*, 1 Anst. 174; *Kennedy v. Kennedy*, (Sup.) 24 N. Y. S. 424.

under equitable circumstances, set aside a conveyance of shares, attempted or made by the bank against the will of an insolvent stockholder for the satisfaction of a debt really due to a director, under color that the same is due to the bank; such sale being a fraudulent abuse of a statutory power, and a fraudulent attempt, without the authority of the stockholder, to give preference among his creditors.¹ In another case the complaint in an action to recover certain shares of mining stock alleged that plaintiff made the purchase of said stock in order to buy its peace, and save annoyance, avoid litigation, and prevent a cloud upon its title; that the value of said shares of stock was merely nominal; and that plaintiff's remedy at law would be inadequate, and the injury to plaintiff would be irreparable. It was held that equity would interfere by injunction to restrain the party wrongfully in possession of the property, from disposing of it.²

§ 542. **Municipal Securities.**—Relief is sometimes successfully invoked by states and municipalities against the transfer of bonds and other evidences of public indebtedness fraudulently and illegally issued, or against which equitable or valid legal defences exist, in the hands of the holders, which would not be available after their sale and delivery to *bona fide* purchasers without notice. And a state court of chancery has jurisdiction to grant an injunction, at the suit of another state, against a transfer of negotiable securities issued by the latter.³ But plaintiffs were held not entitled to equitable relief upon the ground that its bonds were issued directly to a railroad company, instead of being sold by commissioners. To authorize that relief, it should have been made to appear that defendants are not *bona fide* holders.⁴

§ 543. **Same — What Complainant required to allege.**—Complainant must in such case allege facts showing an equitable title to relief, and that it has no defence against the bonds which would be available in an action on them by *bona fide* purchasers. Nor is the mere fact that numerous independent parties hold separate

¹ *Seagraves v. Railroad Bank*, 4 R. I. 372.

² *Sierra Nev. Min. Co. v. Sears*, 10 Nev. 346. See also *Schuetz v. German-American Real-Estate Co.*, 47 N. Y. S. 500; 21 App. Div. 163.

³ *Delafield v. State of Illinois*, 26 Wend. (N. Y.) 192. As against such a bill it cannot be said that there is an adequate remedy at law. *Dodge v. Van Buren Circuit Judge*, (Mich.) 76 N. W. 315.

⁴ *Town of Venice v. Woodruff*, 62 N. Y. 462.

instruments upon which they might bring separate suits, sufficient to justify a court of equity in entertaining an action by the maker to compel them to litigate their claims in a forum which he selects. He must, in addition, make out a case which would sustain the action against one of them alone. Therefore an action cannot be maintained by a town against various holders to restrain the transfer and for the cancellation of bonds issued by its supervisor, under a statute to aid in the construction of a railroad, which bonds were void because issued without the requisite consent of two-thirds of the taxpayers of the town, it not having been found that defendants were *bona fide* holders.¹

§ 544. **Transfer of Funds by Public Officers.** — In a proper case there is no doubt of the power of a court of equity, even on the application of a private party, to restrain a state or municipal officer from making such a wrongful disposition of public funds as will result in a total loss to the complainant of his claim against the state, or seriously hinder and delay its collection. But relief can only be demanded against the misapplication of a specific fund or sum appropriated or set apart to meet the indebtedness due the complainant, or to pay the class of demands to which it belongs, and the application for an injunction must be made before actual change has taken place. And where the money in a state treasury devoted by the state constitution to the payment of a particular indebtedness has been applied, by direction of the state legislature, to another purpose, and afterwards money came into the state treasury which a public creditor, who was entitled to the money first unapplied, sought to have paid to himself in discharge of his claim, it was held, that although a court of chancery might properly have enjoined the state treasurer from the original misapplication, on bill filed in time, yet that it had no power, after the misapplication, to restrain the state treasurer from applying to the general purposes of the state subsequently received moneys, not specially dedicated by law, nor to compel the treasurer by mandamus to substitute such general funds for the moneys already improperly paid.²

§ 545. **Transfer under Execution.** — A party may be injuriously and in many ways affected by acts done under and by virtue of an execution in the hands of a public officer, on account of which

¹ *Town of Venice v. Woodruff*, 62 N. Y. 462.

² *Self v. Jenkins*, 1 Hugh. 23.

he can have no relief in equity.¹ In the first place, there is considerable reluctance on the part of courts of equity to interfere with the regularly prescribed modes of procedure at law for the enforcement of legal demands, and in the second, legal remedies are generally provided for the correction of errors and abuses occurring in the enforcement of judgments.² Still, cases often arise wherein a transfer under execution, or other final process, would work irreparable injury and wrong to a party, by transferring his property, or an interest which he possesses in specific property, or he may similarly suffer by reason of an illegal or merely colorable transfer under legal process which casts a cloud upon his title, against which he will be entitled to relief by injunction. And where one went into possession of a tract which had been plotted as a public square, claiming title thereto by virtue of an invalid attempted vacation of such square, it was held that he was entitled to an injunction restraining the sale of such land under an execution against a person having no interest therein.³

§ 546. **Same — Prejudice of Unpaid Creditors.** — An injunction is properly granted to restrain the sale, by sundry judgment creditors, of a portion of a railroad situated in the state in which the judgments were obtained, the road being operated in a continuing line through several states, where the injunction is necessary, both to prevent a multiplicity of suits, and irreparable injury and damage to the creditors of the insolvent company.⁴ And when a judgment creditor is proceeding by execution to raise the full amount of his judgment, when this has been in fact reduced by payment or otherwise, a subsequent execution creditor is entitled to the aid of the court of chancery to restrain the prior creditor from selling under the execution until the payments are ascertained and credit given for them.⁵ So where attachments

¹ The jurisdiction has been extended by statute to meet such cases in a few estates. See *Brown v. Atkinson*, (Pa.) 9 Kulp, 164; see also *Bryn v. Windsor*, 99 Ga. 176; *Pratt v. Boody*, 55 N. J. Eq. 175.

² *Noble v. Alabama*, 43 Ga. 466.

³ *Peshine v. Binns*, 11 N. J. Eq. (3 Stock.) 101. See also *Reeves v. Bolles*, 22 S. E. 626; 95 Ga. 402. Property in the sheriff's possession under a legal writ, at the instance of a privileged and judgment creditor, cannot be seized and sold to the detriment of such creditor, but only the debtor's interest subject thereto, and the purchaser cannot enjoin the previous execution. *Henry v. Tricon*, 36 La. An. 519.

⁴ *Dupre v. Anderson*, 13 So. 743; 45 La. An. 1134.

⁵ *Moore v. Kleppish*, (Iowa), 73 N. W. 830.

have been issued against a debtor, and notice of garnishment served upon a garnishee, and other creditors thereafter obtain separate judgments against the debtor, and levy executions upon the goods in the hands of the garnishee, the attaching creditors, in an action to determine the priority of liens and for an injunction, may enjoin the defendants from selling under their executions until the final determination of the case.¹ But a purchaser at a sale made by a trustee under a deed for the benefit of creditors, and who is also one of the creditors, cannot restrain the trustee from collecting the purchase-money, because the estate is indebted to him in a much larger amount.² Nor will an injunction be granted to restrain execution creditors from proceeding to sell the property of their debtor, on the ground that certain claims to the property have been interposed, casting a cloud upon the title and rendering it probable that the property will bring less than its value, to the injury of the other creditors of the same debtor, the debtor being insolvent.³

§ 547. **Same — Personalty required to operate Railroad.** — To prevent irreparable injury, as well to the public as to private parties, equity will interfere to prevent a sale or sequestration, under execution or other process, of property and revenues required by a railroad company, in order to enable it to continue in the performance of duties of a public nature. And the

¹ *Northfield Knife Co. v. Sharpleigh*, 24 Neb. 635; 39 N. W. 788.

² *Copehart v. Etheridge*, 68 N. C. 353.

³ *Robinson v. Thompson*, 30 Ga. 933. See also *Welde v. Scitten*, 59 Md. 72. A party holding a lien on lands, based on a conveyance to trustees for his security, is not entitled to an injunction to prevent a judgment creditor to the grantor, whose judgment is subordinate to the lien, from enforcing his judgment by the sale of the lands on execution. The execution would operate only on the equitable interest of the judgment debtor, and would have the prior lien on the same condition, both at law and in equity, as if no sale had been made. *Union Bank of Maryland v. Poultney*, 8 Gill & J. (Md.) 324.

PROPERTY NOT THAT OF JUDGMENT DEBTOR. — A., an infant, died intestate, being possessed at the time of a slave, and leaving B., an infant brother, her sole distributee. The intestate not being indebted to any person, no administration was taken out on her estate; but the slave passed into the hands of the father of B., and was levied under an execution against him as his property. *Held*, that under this state of facts a court of equity will entertain jurisdiction to restrain the creditor from selling the slave as the property of the father. *Gould v. Hill*, 18 Ala. 457. But under the statutes, which generally exist for trying the rights of property seized under execution or attachment generally found, this case would seldom be applicable or of value.

revenues of a railroad corporation which are pledged for the payment of outstanding bonds are not liable to attachment by judgment creditors of the corporation, and a court of equity will grant an injunction against such attachments.¹ But where a creditor of a railroad company, which had mortgaged its road and equipments, levied on the personal property of the company while in its possession, and before the maturity of the mortgages, and the mortgagees applied for an injunction, on the ground that the rolling-stock was necessary to enable the company to pay interest as it was to become due, it was held, that, in the absence of any averment that the property left after the levy would be insufficient to pay the principal and interest upon the next default, the injunction could not issue.²

§ 548. *Wife's Property.* — A distinct equitable ground exists for interference to prevent transfer by the husband, or another, of the property of a married woman, the protection of the rights and property interests of married women being a distinct head of equitable jurisdiction. In the exercise of its power for her protection the court will, on application by her, restrain her husband from proceeding at law to obtain possession of the legacy, or portion in personal estate, which comes to the wife by will or inheritance, without providing for her support, unless she is residing apart from her husband without his consent and without sufficient cause.³ So if a man buys a burial lot in a cemetery, and his wife goes to expense in improving it, and interments are made there, she may have him enjoined from selling it.⁴ And an injunction will be granted to restrain the sale of a wife's property for the debt of her husband where her title is clear and undoubted;⁵ otherwise, where her title is disputed, and she has been active in defeating her husband's creditors. In such case the creditor will be allowed to test ownership, and she will be left to her remedy at law.⁶ But where the administrator of a husband undertook to convey away a claim standing in the name of the husband, but the separate

¹ *Dunham v. Isett*, 15 Iowa, 284.

² *Coe v. Knox County Bank*, 10 Ohio St. 412.

³ *Fry v. Fry*, 7 Paige (N. Y.), 461.

⁴ *Schroder v. Wanzor*, 36 Hun (N. Y.), 423.

⁵ *Allen v. Benners*, 10 Phila. (Pa.) 40. See also *Vermilyea v. Vermilyea*, 14 How. (N. Y.) Pr. 476.

⁶ *Simson v. Bates*, 10 Phila. (Pa.) 66.

property of his wife, she had the right to an injunction preventing the money due on account of such claim from coming into the possession of the administrator or his assignee, and compelling payment direct to her.¹

§ 549. **Joint Owners.** — Injunction is sometimes an appropriate remedy to restrain transfers and protect the interests in property owned and held jointly, on behalf of one joint owner against another. One part owner of a steamboat may maintain a bill in equity to enjoin the other from selling his share, and to subject it to other claims for which he and complainant are jointly liable, when the latter apprehends that, in consequence of the defendant's insolvency, he will become solely liable.² And in an action by a purchaser of a minority interest in a vessel, who bought an agreement that he should be master, against the majority owners, to enforce a specific performance, it may be proper to grant him a preliminary injunction restraining defendants from selling their interests without giving their vendee notice of plaintiff's claim.³ But a landlord is not entitled to an injunction to restrain the surviving partner of a lessee firm from disposing of the stock in trade, excepting the usual course of business.⁴

§ 550. **Landlord and Tenant.** — Injunction is a proper remedy to enforce a landlord's lien upon property found upon the rented premises, as against execution creditors of the tenant, who are endeavoring to sell it to satisfy their debts;⁵ also to prevent the fraudulent assignment of a lease by a tenant where the effect would be to defeat the landlord's claim for rent.⁶ But in order to obtain an injunction to prevent a lessee from removing a crop, a part of which is due to the plaintiff as rent, the bill of complaint must aver the lessee's insolvency, and that he has no

¹ *Potter v. Potter's Adm'r*, (Vt.) 23 A. 856.

² *Thoms v. Southard*, 2 Dana (Ky.), 475.

³ *Higgins v. Jenks*, 3 Ware, 17.

SALVAGE FUND. — One of the several parties claiming liens upon a fund for salvage services may maintain an action for an injunction, and that the fund be brought into court to abide a determination of the respective claims of all parties, where it is shown that the fund is in danger on account of the irresponsibility of the parties who have possession. *Lewis v. Dodge*, 17 How. (N. Y.) Pr. 229.

⁴ *Milner v. Cooper*, 65 Iowa, 190.

⁵ *Click v. Stewart*, 36 Tex. 280.

⁶ *Lewis v. Wilson*, (Sup.) 17 N. Y. S. 128.

tangible property which could be made the subject of an execution or attachment.¹ And in a proper case courts of equity lend their protection by injunction to tenants against landlords; as where the landlord has repossessed himself of the lessee's property, to prevent its destruction.²

§ 551. **Principal and Surety.** — On the general equitable principle of preventing fraud and irreparable injury, an injunction was granted at the instance of a surety against a purchaser of property from his principal who was insolvent, it appearing that the purchaser was about to remove the property from the county.³ For like good and equitable reasons, where a creditor fraudulently aids and assists the principal debtor to remove from the county with the intent to hinder and delay the surety in his remedy against the principal for the sum in which he was bound to the creditor, equity will enjoin the latter from enforcing his claim against the surety.⁴

§ 552. **Disposal by Will.** — The specific performance of a contract to devise specific property may be enforced indirectly by injunction;⁵ but in the absence of such contract and its execution in whole or in part by a party, a court cannot interfere with testamentary transfers of property. A man cannot be restrained from bequeathing his own money to a father, in trust for his children, even if the money, or a part thereof, has to be collected from a surety of the father on a note to the testator; nor can a will, made in another state, be contested by the surety on the ground that the devise was fraudulent, in a collateral proceeding to enjoin the collection of a debt due by the surety of the testator, especially when all the parties interested in the will are not parties to the proceeding.⁶

§ 553. **Conditions of granting Relief — The Injury.** — It is a well-established principle often adverted to that equity will not interfere with the assertion of a party's rights by action at law or otherwise, unless facts independent of the threatened doing of

¹ Gregory v. Hay, 8 Cal. 332. Compare Paige v. Akins, (Cal.) 44 P. 666.

² Genesee & W. V. Ry. Co. v. Retsof Min. Co., (Sup.) 38 N. Y. S. 896; 15 Misc. Rep. 187.

³ Anderson v. Walton, 35 Ga. 202. In such case the surety is entitled to the injunction without first paying the debt. Id.

⁴ Smith v. Hays, 1 Jones (N. C.) Eq. 321.

⁵ Supra, § 503.

⁶ Palmer v. Gardiner, 77 Ill. 143.

an act or institution of legal proceedings or actual pendency of an action are shown, making the case one of proper equitable cognizance. And one of the indispensable features of a case presented for relief by injunction, in matters pertaining to the rights of creditors and others, with reference to changes of the *status* of things and relations of parties, is a showing that serious or irreparable injury will probably result from a refusal to grant it. And where plaintiff claimed an interest in mortgaged property and defendants deposited in court the amount claimed by him, to await a final decision, and satisfy any judgment that might be rendered, his application for an injunction and receiver was refused.¹ Nor should an injunction be granted to a complainant whose rights in certain property must be determined by the construction to be given to written instruments which are recorded; for any purchaser would take with notice of the instruments, and be bound by them the same as the defendant is bound.² Nor will a court of chancery interpose by injunction to restrain a garnishee from selling or disposing of property of the debtor in his hands, when the bill contains no allegation that there is any danger of loss by reason of the insolvency of the garnishee, before a trial can be had in the suit at law.³ On the same general principle a court of equity will refuse to grant an injunction and appoint a receiver of the property of a debtor alleged to be insolvent, who has transferred his property by a deed alleged to be fraudulent, unless fraud, and imminent danger if the possession is not taken by the court, are clearly proved.⁴

§ 554. **Equitable Claim to Relief must be shown.** — In nearly every phase and illustration of this branch of the subject of equitable relief by injunction, another general principle has had its important bearing, namely, that the complainant must present a case of an equitable as distinguished from a legal

¹ Welch v. Henry, 32 Kan. 425; 4 P. 814.

² Mariposa Co. v. Garrison, 26 How. (N. Y.) Pr. 448.

³ Biglow v. Andress, 31 Ill. 822. A debtor sold his creditor certain goods, which were to be a satisfaction of the debt, unless they were taken from him by superior liens. *Held*, that the debtor could not enjoin the creditor from proceeding to judgment on his claim without showing that there were no superior liens outstanding, as the debtor had a right to reduce his claim to judgment, though he could not collect it so long as he held the goods. Camp v. Matheson, 29 Ga. 351.

⁴ Blondheim v. Moore, 11 Md. 365.

character. It is but a proper application of this principle to refuse an injunction restraining a creditor from enforcing a debt, to give the surety an opportunity to avail himself of collateral security.¹ And an injunction will not be granted at the suit of a junior attaching creditor, restraining a prior attaching creditor, after judgment obtained, from selling on execution personal property of the defendant upon which he has levied an attachment, unless he has bound himself to such junior creditor for a sufficient consideration not to do so, but to pursue some other course, a departure from which will work irreparable mischief to the plaintiff.² Nor will a judgment creditor be enjoined from enforcing his execution against lands in the hands of a purchaser from the judgment debtor, although ten years have elapsed since the purchase was made, and the creditor has neglected opportunities to collect his debt from other property of the debtor.³

§ 555. **Complainant must not be himself at Fault.** — Complainant will not only be required to show a distinct equity in his favor, but must be willing to do equity in the premises. Thus, where a party has borrowed money of a bank, although the loan be one forbidden by law, and the securities therefore void in the hands of the bank, the borrower may not, while retaining the money, obtain from a court of equity an order restraining the bank from negotiating the securities, or a decree cancelling them and directing their return.⁴ But equity will lend its assistance to a grantee from a trustee under a deed made in fraud of creditors against those who are not creditors.⁵

¹ *Rutledge v. Greenwood*, 2 Desaus. (S. C.) 389. See also *Marks v. Jones*, (Minn.) 73 N. W. 710. A debt contracted by the payee of a note with the maker, after assignment of the note by the payee and notice to the maker, is no ground for enjoining the assignee from recovering the amount, notwithstanding the insolvency of the payee and failure to pay such debt. *Hunt v. Martin*, 2 Litt. (Ky.) 82.

² *Damec v. Stearns*, 30 Cal. 114. A creditor who has received payment of his debt from his debtor cannot maintain a bill in equity to set aside for irregularity proceedings in insolvency which have been subsequently instituted against the debtor, and to enjoin the assignee from prosecuting a suit at law to recover back such payment as a preference, if he alleges therein that the payment to him was not an unlawful preference. *Fuller v. Caldwell*, 6 Allen (Mass.), 503.

³ *Wagner v. Pegues*, 10 S. C. 259.

⁴ *Elder v. First Nat'l Bank of Ottawa*, 12 Kan. 238.

⁵ *Gridley v. Wynant*, 23 How. 500.

§ 556. **Remedy at Law.** — Little need be added concerning the effect of the existence of a remedy at law upon the question of granting or refusing the equitable remedy herein, since the jurisdiction under this and all the preceding heads has been wholly or in part founded upon the absence of an adequate legal remedy, and nearly every case stands as an exponent of that controlling principle. Where personal property is improperly levied on, the party claiming it cannot enjoin the creditor from proceeding at law, on the ground that another person has interposed a claim to it by mistake. The true owner has an adequate remedy at law, by suit or interposing a claim under the statute (of Alabama);¹ and a similar statute exists in nearly if not quite all the states. Nor will an injunction issue to restrain a threatened sale of property, where replevin affords an adequate remedy.²

¹ *Marriott v. Givens*, 8 Ala. 694.

² *Minnesota Linseed Oil Co. v. Maginnis*, 32 Minn. 193. See generally *Strang v. Richmond, P. & C. R. Co.*, 93 F. 71; *Wolf River Lumber Co. v. Pelican Boom Co.*, 53 N. W. 678; 83 Wis. 426; *City of Newport v. Newport Light Co.*, (Ky.) 21 S. W. 645; *Stein v. Benedict*, (Wis.) 53 N. W. 891; 83 Wis. 603; *Syracuse Rapid-Transit Ry. Co. v. Salt Springs Nat. Bank*, 59 N. Y. S. 1066; 28 Misc. Rep. 619.

CHAPTER XI.

PERTAINING TO TRUSTS AND CONFIDENCES.

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| <p>§ 557. General Ground of Jurisdiction.
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§ 557. **General Ground of Jurisdiction.** — Another important branch of equity jurisdiction in the exercise of which the granting of an injunction is frequently necessary, is in matters of trust. In the exercise of its powers to enforce the proper performance of their duties, the court may enjoin trustees from proceeding in disregard of the conditions necessary to the proper exercise of their authority, or from an improper use of such authority there being no adequate remedy at law.¹ On this ground the rights of the *cestui que trust* will be protected by restraining the trustee from doing any act inimical to his duty as such.² Thus, an injunction will be granted when necessary to prevent the trustee from encumbering the trust property by mortgage, conveyance, or contract, or in any other manner

¹ *Hall v. Rood*, 40 Mich. 46. Where a portion of the trust fund has been disposed of in violation of the trust, the beneficiaries will be entitled to an injunction to prevent a further violation. Thus where a trustee had misapplied the proceeds of sales of the trust estate and refused to account to the beneficiary, he was enjoined from a threatened sale of other portions of the property, his insolvency being shown. *Albright v. Albright*, 91 N. C. 220.

² *People v. Clark*, 70 N. Y. 518; *Owen v. Ford*, 49 Mo. 438; *Chesapeake, etc. R. Co. v. Patton*, 5 W. Va. 234; *Menard v. Hood*, 68 Ill. 121; *Dance v. Goldingham*, L. R. 8 Ch. 902. See *Davis v. Browne*, 2 Del. Ch. 188; *Fernie v. Maguire*, 6 Ir. Eq. 137.

which would constitute a breach of the trust.¹ Equity will not confine its protecting powers to the party having the beneficial interest, but will in a proper case grant an injunction in favor of the trustee; for instance, to restrain his *cestui que trust* from issuing execution for the collection of trust funds on a judgment in his name.²

§ 558. **Caution in exercising the Jurisdiction — Limitations.** — In cases where threatened violations of trust if committed would be irremediable, it is proper to grant a preliminary injunction without notice to the defendant.³ But though the protection and proper administration of trusts is an important branch of equity jurisdiction, great care should be exercised in granting injunctions against trustees, lest by tying their hands the trust estate may be left without any representative. A court of equity should not divest the trustee of his trust until he has had an opportunity of answering, except in a case of pressing necessity and imminent probability of great danger and detriment from delay.⁴ And when an injunction is sought against an executor or trustee, the charges should be specific; the writ will not be awarded in the first instance upon mere general charges in the bill that he has abused and violated his trust.⁵ And it is held that to warrant a court of equity in granting an injunction and receiver in a suit for maladministration of trust funds, there must be proof that the funds have been invested in some tangible property, on which complainant can equitably claim a lien. If moneys have been so expended that they cannot be traced or identified, there is no opportunity for these remedies to attach.⁶ The abuse of trust which will warrant an injunction must relate to the management of pecuniary affairs or property interests. Thus, it was held that the fraudulent abuse of their trust by the directors of a banking corporation respecting the election of directors furnished no sufficient ground for interference by a court of equity.⁷ And in

¹ *Great W. R. Co. v. Birmingham Co.*, 2 Ph. 597; *McCorkle v. Brem*, 76 N. C. 407; *Williams v. Wadsworth*, 51 Conn. 277; *Curtis v. Buckingham*, 3 V. & B. 168; *Spiller v. Spiller*, 3 Swanst. 556.

² *Reeser's Appeal*, (Pa.) 5 A. 445.

³ *Davis v. Browne*, 2 Del. Ch. 188; *Fernie v. Maguire*, 6 Ir. Eq. 137.

⁴ *Boyd v. Murray*, 3 Johns. Ch. 48; *Ogden v. Kip*, 6 Johns. Ch. 160.

⁵ *Boyd v. Murray*, 3 Johns. Ch. 48.

⁶ *Allen v. Freedman's Saving & Trust Co.*, 14 Fla. 418.

⁷ *Ogden v. Kip*, 6 Johns. Ch. 160.

such cases there must be alleged and shown probable danger of waste or loss, to justify relief by injunction and displacement of the legal right of the trustee.¹ Nor will courts interfere by interlocutory injunction to restrain the transfer of an alleged trust fund when the defendant denies that it is a trust fund, and when the right to deal with it is the question to be determined upon the final hearing.²

§ 559. **Trusts with Respect to Real Property.** — The jurisdiction is beneficially exercised in cases of trust of real property, though equity will not interfere to prevent the execution of a general power to sell lands for the benefit of others, where it does not appear that the power is being inequitably or unjustly exercised.³ Yet it is a proper and favorite use of the writ of injunction to prevent the power being abused. Thus where land has been conveyed to a corporation in trust to be used for the purpose of a public street, the owner of property on such street, being regarded as a *cestui que trust* with reference to such fund, may enforce the execution of the trust by restraining its violation.⁴ So a temporary injunction will be granted a remainderman to prevent a sale of the trust estate under a judgment against the trustees or tenant for life in whom the title is vested.⁵ And an injunction will be granted to restrain a trustee from selling real estate without having given the bond required of him by the instrument creating the trust,⁶ or upon conditions

¹ *Satterfield v. John*, 53 Ala. 127. A. filed his bill praying for an injunction to restrain the sale, by a trustee, of a tract of land conveyed to secure the purchase-money, alleging "that, since the purchase was made, the plaintiff had caused a survey of the land to be made, and, instead of there being 1,500 acres, as represented, there were only 900 acres." This was the only allegation in the bill, on the ground of which relief was asked. *Held*, 1. That the bill did not present sufficient equity, on its face, to justify the interference of a court of equity. 2. That, upon a sale of a tract of land in gross, and not by the acre, the purchaser was not entitled to any abatement of the purchase-money for a deficiency in the quantity of the land, there being no fraud, misrepresentation, or mistake; and the evidence showing that the parties contemplated a probable deficiency in the number of acres specified in the deed, and that said number of acres was not relied upon by the parties as a material element in the purchase. *Reed v. Patterson*, 7 W. Va. 263.

² *Bank of Turkey v. Ottoman Co.*, L. R. 2 Eq. 366.

³ *Selden v. Vermilyea*, 1 Barb. 58.

⁴ *Lawrence v. Mayor*, 2 Barb. 577. See *Brundage v. Deardorf*, (C. C.) 55 F. 839.

⁵ *Keaton v. Baggs*, 53 Ga. 286.

⁶ *Pool v. Potter*, 63 Ill. 533.

which are unfavorable to the sale, upon application of the *cestui que trust*.¹

§ 560. **With Respect to Legal Proceedings.** — If relief by injunction is sought on the ground that the subject-matter of a suit at law is a trust and within the exclusive jurisdiction of a court of equity, the proceedings at law should not be enjoined, but only the execution issued upon the judgment, if any, recovered at law.² But where the plaintiff in an ejectment suit had purchased the land while acting for a corporation and in the line of duty as agent for it, he was enjoined from prosecuting an action in ejectment for the land against the corporation, although he had taken the conveyance in his own name.³

Upon analogous principles to those just stated, a court of equity will, in a proper case, interfere to prevent a dismissal of an action, as where it was brought under a power of attorney for the benefit of complainant.⁴

§ 561. **Implied Trusts.** — The jurisdiction to protect beneficial interests in trust funds extends to trusts created by implication from the relations or dealings between the parties and those commonly designated as resulting trusts. Thus where one has purchased land with his own money, the title being taken by a third person in possession, he in whom the resulting trust is thus created may be restrained from the enforcement out of such land of a judgment against the holder of the legal trust, since the judgment creditor is chargeable with notice of the trust.⁵ So a party in possession who has made valuable improvements under a parol agreement to convey, is entitled to a specific performance, and may enjoin creditors of his grantor from levying upon the land under judgments obtained against the vendor, provided the agreement was made while the vendor was solvent and with no intention to defraud his creditors.⁶ And where complainant had entered into an agreement with the defendant whereby defendant had agreed to devise to complainant certain

¹ *Dance v. Goldingham* L. R. 8 Ch. 902. A court of equity may restrain an executor from selling lands for the payment of claims he knows to be without merit. *First Baptist Church of Hoboken v. Syms*, (N. J. Ch.) 28 A. 461.

² *Justice v. Scott*, 4 Ired. Eq. 108.

³ *Trenton Bkg. Co. v. McKelway*, 4 Halst. Ch. 84.

⁴ *Monroe v. McIntyre*, 6 Ired. Eq. 65.

⁵ *Ferrin v. Errol*, 59 N. H. 234.

⁶ *Brown v. Prescott*, 63 N. H. 61.

premises, upon the consideration that complainant would be allowed to live with and would be cared for by defendant, during the remainder of complainant's life, complainant having complied with the contract, was allowed an injunction to restrain defendant from conveying the premises to a third party.¹

§ 562. **Contract between two Persons for Benefit of third.** — It is a sufficient reason for granting an injunction that one of the defendants has agreed to do a specific thing, and the other defendant holds a covenant on the part of his co-defendant, taken in behalf of the plaintiff according to a prior understanding, and so holds a specific fund, which puts it in the power, and makes it the duty of one of the defendants, to see that the agreement is carried into effect by the others, the plaintiff alleging that the defendant holding the fund intends to pay it out contrary to the understanding between the parties.²

§ 563. **Property confided to Agents.** — Equity will, where there is a duty incumbent upon one occupying an ordinary relation, as that of agent, to deliver a thing in specie, attach a trust to the article to compel such delivery, and enjoin its transfer to another person than its owner.³ The province of equity to interfere in such cases has long been established. In an English case⁴ the Vice-Chancellor said: "I have not the slightest doubt that the plaintiff is entitled to the protection of the court against the wrongful act which is threatened by his agent. I have known many bills to have been filed by the court of exchequer formerly, on the behalf of the owners of cargoes, to prevent improper dealings with the goods by the agent or persons in the situation of agents."

§ 564. **Interference of Third Party with Trustee's Possessions.** — Not only will the *cestui que trust* be entitled to an injunction against derelictions by the trustee, but he may enjoin third parties who are interfering with his possession and proper enjoyment of the trust property. Accordingly an *interim* injunction was

¹ *Pflugar v. Pultz*, 43 N. J. Eq. 440.

² *Ashe v. Johnson*, 2 Jones, (N. C.) Eq. 149.

³ *Somerset v. Corkson*, 3 P. Wms. 389; *Arundel v. Phillips*, 10 Ves. 139; *Nutbrown v. Thornton*, 10 Ves. 163; *Fills v. Read*, 3 Ves. 163. See also *Lamphiere v. Lange*, L. R. 12 Ch. D. 675; *Venable v. Everett*, 63 Ga. 633; *Sierra Nevada, etc. Co. v. Sears*, 10 Nev. 346; *Hart v. Herwig*, L. R. 8 Ch. Div. 860; *Joseph v. McGill*, 52 Iowa, 127; *French v. Snell*, 29 N. J. Eq. 95; *Volger v. Montgomery*, 54 Mo. 577.

⁴ *Arundel v. Phillips*, 10 Ves. 139.

granted to a married woman living apart from her husband under the following circumstances: On a marriage a leasehold house was settled upon the usual trusts for the wife for life, for her separate use; and the husband and wife continued to reside in the house. Differences arose between them, they ceased to cohabit, and the wife instituted proceedings for divorce or judicial separation. The husband claimed the right to go to and use the house when and as he thought fit, not for the purpose of consorting with his wife, but for other purposes.¹

§ 565. **Confidential Employments.** — Injunction is a peculiarly appropriate remedy to restrain those occupying a confidential relation from disclosing or making public secrets which have been imparted to them during such relation or employment. In such cases equity imposes upon the recipient a strict obligation not to divulge such knowledge, and enforces the obligation when necessary by injunction. Numerous illustrations might be given, such as of attorneys and special agents, having custody of the books and documents of their principals.² To justify the writ it must appear that the confidential communications were such as the communicant had a right not only to impart but to have considered confidential.³ But where a fraudulent transaction has come to the knowledge of the person occupying the confidential relation, equity extends no protection.⁴

§ 566. **Same — Solicitors.** — The jurisdiction to restrain a solicitor from acting for the antagonist of his former client is founded upon the principle that a man ought to be restrained from doing any act contrary to the duty he owes to another; and it will be exercised at the instance of the former client, irrespective of the question whether the solicitor was discharged by him or had discharged himself, whenever the transaction in reference to which the injunction is sought so flows out of or is so connected with that in which the solicitor was formerly retained, that the same matter of dispute may probably arise.⁵

¹ *Symonds v. Hallett*, L. R. 24 Ch. Div. 346.

² *Evitt v. Price*, 1 Sim. 488; *Morrison v. Moat*, 9 Hare, 255; *Prince Albert v. Strange*, 1 Mac. & G. 25; *Davies v. Clough*, 8 Sim. 262; *Goodale v. Goodale*, 16 Sim. 316; *Lewis v. Smith*, Ib. 417; *Williams v. Prince of Wales*, 23 Beav. 340.

³ *Stein v. National Life Ass'n*, 105 Ga. 821.

⁴ *Gartside v. Outram*, 3 Jur. (N. S.) 40.

⁵ *Little v. Kingswood Collieries Company*, 20 Ch. Div. 733, by Hall, V.-C.

§ 567. **Writings of a Literary Character — Confidential Correspondence.** — In restraining the publication of private letters the equity is so evident and the breach of confidence and social duty frequently so flagrant as to require no elucidation.¹ The doctrine of courts of equity in such cases is not founded upon the fact that the publication of letters would be painful to the feelings of the writer, but upon a civil right of property which the court is bound to respect.² There seems never to have been any serious question as to an author's property right in letters, having the character of literary compositions. By sending them the writer does not part wholly with his property in the literary composition, nor give the receiver the power of publishing them. The receiver has at most a special property in them, and may possibly possess property in the paper upon which the writing has been done. But this does not give a license to any person to publish them to the world. The proprietorship of the receiver is joint with that of the writer. Whatever the extent of such joint interest, letters having the character of literary compositions must be treated as within the laws protecting the rights of literary property; and a violation of these rights in that instance is affected with the same legal consequences as in the case of an unpublished manuscript of an original composition of any other description.³ On the question of preventive relief against the publication of mere private letters on business or on family affairs or on matters of personal friendship, and not falling strictly within the definition of literary composition, the authorities are not numerous in this country, but it is well settled upon English cases and the few American cases that

¹ See Woodes, Lect. 56, p. 415; *Pope v. Curl*, 2 Atk. 342; Am. L. Reg., vol. 1, no. 8, p. 449.

² In *Gee v. Pritchard*, 2 Swanst. 413, 416, this property interest was well defined by Lord Eldon: — "That the property is qualified in some respects; that, by sending a letter, the writer has given, for the purpose of reading it, and in some cases of keeping it, a property to the person to whom the letter is addressed; yet, that the gift is so restrained, that, beyond the purposes for which the letter is sent, the property is in the sender. Under such circumstances, it is immaterial whether the intended publication is for the purpose of profit or not. If for profit, the party is then selling; if not for profit, he is then giving that a portion of which belongs to the writer."

³ Story's Eq. Jur., sec. 944; *Pope v. Curl*, 2 Atk. 342; *Lord Perceval v. Phipps*, 2 Ves. & Beam. 19, 24; *Thompson v. Stanhope*, Ambler, 739, 740; *Gee v. Pritchard*, 2 Swanst. 403, 414, 415, 422, 425.

have been decided that the writers and senders are entitled to protection.

§ 568. **Trade Secrets.** — Under the head of confidential and fiduciary relations, the violation of which equity will enjoin, may be classed trade secrets, learned in the course of confidential employment.¹ And in England the confidential relation warranting injunction against disclosure of trade secrets arises from the fact of employment without regard to its character.² If a person invents and keeps secret a process of manufacture, whether a proper subject for a patent or not, he has a property in it which a court of chancery will protect against one who, in violation of contract and breach of confidence, undertakes to apply it to his own use or to disclose it to third persons; and a person, who with notice of the relations existing between the owner and the person entrusted with the secret, makes arrangements to have the secret communicated to him, and to use it for his own benefit, will be restrained by injunction.³ And injunction will issue at the suit of one owning and operating a secret for the manufacture of leather, to restrain his former employees from divulging such secret, and rival manufacturers from using it, but not to restrain such employees from telling where he buys his materials, and to whom he sells them when manufactured.⁴ But it was held that an injunction would not lie to restrain the defendant from disclosing an art or invention, although it was taught him by the plaintiff under a sworn promise not to divulge it.⁵

§ 569. **Equitable Claim to Relief and Danger of Loss must be shown.** — Equity does not exercise its extraordinary powers except when absolutely necessary to protect some equitable interest in danger of being lost or destroyed or injured beyond reparation; and by an equitable interest in this connection is meant one which it is the recognized duty and province of courts

¹ *Cholmondeley v. Clinton*, 19 Ves. 261; *Prince Albert v. Strange*, 1 Mac. & G. 25; *Morrison v. Moat*, 9 Hare, 255; *Evitt v. Price*, 1 Sim. 483; *Williams v. Williams*, 3 Mer. 159; *Greon v. Floghamb*, 1 Sim. & D. 398; *Yovatt v. Winyard*, 1 Jac. & Walk. 394; *Lewis v. Smith*, 1 Mac. & G. 417; *Williams v. Prince of Wales*, 23 Beav. 340; *Goodall v. Goodall*, 16 Sim. 316; *National Gum & Mica Co. v. Braendly*, 51 N. Y. S. 93; 27 App. Div. 219.

² *Louis v. Smellie*, 73 Law T. 226.

³ *Peabody v. Norfolk*, 98 Mass. 452.

⁴ *Saloman v. Hertz*, 40 N. J. 400; 2 A. 379.

⁵ *Deming v. Chapman*, 11 How. (N. Y.) Pr. 382.

of equity to protect. An injunction will not issue to restrain the sale of land conveyed in trust to secure the payment of a note, because an action on the note would be barred by the statute.¹ Nor will an executrix, having power to sell real estate at her discretion, and to enjoy the income derived from the proceeds, be restrained by injunction because she has sufficient means or income aside from the property in question. It is only the reckless or unwise exercise of the power to sell that will be restrained.² And on a bill filed by a defendant at law, on the ground that the subject is a trust, and proper for equitable cognizance, an injunction ought not to be granted staying the trial at law, but only execution on the judgment which may be recovered.³

It is one of the essential elements of an equitable title to relief here, as under other heads, that the danger of loss which the complainant will suffer must not have resulted from his own negligence.⁴

§ 570. **When Party left to Legal Remedies and Defences.** — Where a temporary injunction had been granted, and a perpetual injunction was prayed against certain executors who had failed to file an inventory of personal property, and were wasting the estate of their testator, and it appeared that the surrogate had obliged the executors to give surety until the inventory should be filed, it was held that the surrogate had full power to prevent waste, and as he had exercised it as far as he thought

¹ Goldfrank v. Young, 22 Mo. App. 462. See Rhodes v. Gauladett, 40 Ga. 212.

² Bruner v. Nagle, 7 Phil. (Pa.) 384.

³ Justice v. Scott, 4 Ired. (N. C.) Eq. 108. An executrix was authorized to sell lands to pay debts, in such parcels as seemed to her best. This power was judicially determined to effect a conversion, and to entitle her to the possession of the land. A complaint, seeking to enjoin her from cutting and selling timber, alleged that it was very doubtful whether there was sufficient property to pay plaintiffs' legacies after paying prior ones, and that the cutting and sale of the timber had reduced the value of the land, and made more doubtful the sufficiency of the estate to pay such legacies. It was not alleged that the timber was sold for less than its value, or that the proceeds had been improperly disposed of, or that the estate had lost thereby, or that defendant was insolvent; but the allegations tended to show her ability to respond for any damage to the estate. Held, that the complaint showed no ground for an injunction. Keller v. Ogsbury, 4 N. Y. S. 639.

⁴ Platt v. Sheffield, 58 Ga. 627, holding that an executor will not be enjoined at the suit of a claimant who negligently failed to prepare the proper claim papers.

proper, a court of equity would not interfere.¹ So where a trust instrument gave to the *cestui que trust* the right, upon the trustee's death, to name his successor, and the trustee brought a suit to foreclose a mortgage of which the trust fund consisted, which was abated by his death, — it was held that a new suit brought by the successors, nominated by the *cestui que trust*, should not be stayed, to enforce the payment of costs in the first suit.² But an injunction was continued until the final hearing, to retain control of a trust fund in dispute, where plaintiff sought to have a judgment reformed and the validity of an assignment determined, alleging that the same was procured by fraud, which was denied in the answer; the testimony bearing upon the question being conflicting.³

¹ *Whitney v. Munro*, 4 Edw. (N. Y.) 5. See also *Johnson v. Jones*, 75 N. C. 206.

² *Sears v. Jackson*, 11 N. J. Eq. (3 Stock.) 45.

³ *Morris v. Willard*, 84 N. C. 293.

CHAPTER XII.

PERTAINING TO EXECUTORS AND ADMINISTRATORS.

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| <p>§ 571. The Jurisdiction narrowed by Statute.</p> <p>572. Jurisdiction based upon the Trust Relation.</p> <p>573. Protection extended to both Parties.</p> <p>574. Breaches and Abuses of Trusts; Disposing of Assets.</p> <p>575. Sales of Real Estate.</p> <p>576. Same — Fraudulent Collusion.</p> <p>577. Same — Defective Conveyance.</p> <p>578. Same — Relief in favor of Grantees of Heirs and Purchasers at Administrator's Sale.</p> | <p>§ 579. Fraud of Administrator in confessing Judgment.</p> <p>580. In favor of Administrator against Judgment.</p> <p>581. Relief of Creditors.</p> <p>582. Same — Pending Action for an Accounting.</p> <p>583. <i>Pendente lite</i>.</p> <p>584. Same — Contested Will.</p> <p>585. Where Parties left to Remedies in Court of Probate.</p> <p>586. Defence of <i>res adjudicata</i>.</p> |
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§ 571. **The Jurisdiction narrowed by Statute.** — Much of the former jurisdiction in equity to control by injunction and other equitable remedies, especially that founded upon the absence of a remedy at law, has been taken away by statute and vested in the courts of probate jurisdiction in the various states. These statutes generally make elaborate provisions for correcting errors in the course of administering estates, and for calling administrators and executors to account with respect to the funds entrusted to them. Effective powers are also vested in these courts for enforcing equality and impartiality among creditors, heirs, and distributees.

§ 572. **Jurisdiction based upon the Trust Relation.** — The jurisdiction still remaining in courts of equity is referable to the trust relation which, notwithstanding the increase of legislation on the subject, executors and administrators still hold to all parties interested in the estates entrusted to them. The vesting of other tribunals with jurisdiction over matters affecting executors and administrators does not oust courts of equity of their original jurisdiction pertaining thereto. Such courts still exercise control over matters affecting the administration of estates unless such

jurisdiction has been expressly withdrawn. Therefore a court of equity may properly enjoin enforcement of an execution *de bonis propriis* against an administrator after the insolvency of an estate has been declared by the proper probate court.¹ But mere irregularities in the appointment of an administrator do not constitute sufficient ground for enjoining him from selling property in satisfaction of debts due by the estate.²

§ 573. **Protection extended to both Parties.**—Jurisdiction is not confined to those entitled to the beneficial interest in the trust fund in the charge of executors and administrators, but will in proper cases be administered in their favor. Relief is as freely granted in favor of as against administrators and executors where necessary for their protection in administering the estate. Thus an administrator with the will annexed may enjoin the levying upon and sale of legacies in his hands pending the settlement of the estate of the deceased.³ And if an administrator purchases of his intestate, land sold by order of the orphans' court, pays purchase-money, makes improvements, and is then sued in ejectment by the heirs-at-law, he may have an injunction upon the ejectment suit for the purpose of having the equities settled in chancery, though only when his purchase was made in good faith, and clearly for the benefit of the trust.⁴ Injunction is sometimes necessary to protect the lawful possession of executors and administrators. A non-resident may be enjoined from proceeding with a suit in the common-law courts, wherein he is seeking to obtain possession of a fund belonging to the estate, where a strong showing is made of danger that he will waste or misapply it.⁵ But an executor will not, except upon equitable grounds which are distinct from his trust relation, be granted an injunction to prevent a sale of real estate of the testator to satisfy a judgment obtained against the testator during his lifetime.⁶

§ 574. **Breaches and Abuses of Trust—Disposing of Assets.**—An injunction should be granted to restrain an executor from disposing of and squandering the property of his testator, and

¹ *Lambert v. Mallett*, 50 Ala. 73; *Balkum v. Harper's Admr.*, 50 Ala. 429.

² *Ducote v. Bordelon*, 24 La. An. 145.

³ *Stout v. La Fallet*, 64 Ind. 365.

⁴ *Mulford v. Minch*, 11 N. J. Eq. (3 Stock.) 16.

⁵ *Dougherty v. Walker*, 15 Ga. 442.

⁶ *Redd v. Blandford*, 54 Ga. 123. See also *Edwards v. Hoverstick*, 47 Ind. 138; *infra*, § 580.

thereby defeating the collection of debts due by the estate, where the remedies of creditors at law are, under the peculiar facts of the case, inadequate for their complete protection;¹ also where an administrator is proceeding without proper authority to sell the effects belonging to the estate entrusted to him;² also where an administrator threatens to dismiss an action pending in his name, the dismissal of which would make the plea of the statute against the estate effective.³ In these as in other cases the insolvency of the executor or administrator may be important in connection with other matters, but mere insolvency is not alone sufficient cause for granting an injunction to prevent the sale of the property where it would have the effect of taking the administration of the estate out of his hands.⁴ But the fact that the insolvency of an estate was caused by the neglect of the administrator to collect the assets is properly referable to the probate court as the appropriate tribunal for determining questions relating to the misconduct of the administrator, and constitutes no defence to a bill brought for such purpose.⁵ A creditor need not allege or prove (in Louisiana) that a succession is insolvent, in order to enjoin an illegal sale of the property or any part of it, or to obtain an order for a new and complete inventory.⁶ And an injunction to restrain pending final hearing, the disposition of assets not in dispute, would be only to restrain the executor from using or disposing of the same otherwise than as directed by the will, and this being his duty by law, the discretion of the judge in granting the injunction will not be interfered with.⁷

§ 575. **Sales of Real Estate.** — Heirs-at-law and distributees are entitled to an injunction in cases of improper conduct by administrators whereby their interests are imperilled. And where the heirs had paid all the debts owing by the estate to creditors except a small sum due to a single creditor, and had made partition of the real estate among themselves, it was held they were en-

¹ *Chappell v. Akin*, 39 Ga. 177.

² *Lawrence v. Philpot*, 27 Ga. 585.

³ *Miller v. Coffin*, (R. I.) 36 A. 6.

⁴ *Schanck v. Executors of Schanck*, 8 Halst. Ch. 140. *Mahony v. Stewart*, 81 S. E. 384; 123 N. C. 106. See *Byrd v. Bazemore*, 122 N. C. 115.

⁵ *Balkum v. Harper's Admr.*, 50 Ala. 429.

⁶ *Le Bœuf v. Webre*, 40 La. An. 880; 4 So. 223.

⁷ *Powell v. Hammond*, 81 Ga. 567; 8 S. E. 426.

titled to an injunction to restrain a sale by the administrator without a proper request or any necessity therefor, it appearing that he had obtained his own appointment for the purpose of procuring the land himself.¹ So where an executor, having been given the power to sell under the will, is proceeding to sell real estate for the purpose of paying claims against the estate which are barred by the statute of limitations, parties who have succeeded to the title of the testator are entitled to an injunction to prevent such sale, where if proceeded with it would have the effect of casting a cloud upon their title.² And injunction was also granted to prevent the sale by an administrator to pay debts where there had been a delay of many years in procuring an order to sell after the granting of letters of administration;³ also in favor of a widow, to prevent executors of the estate from selling property to which she was entitled as her award under the laws of the state.⁴ But the fact that an injunction has been granted restraining a sale under a deed of trust is no good reason for enjoining a sale by an executor of the interest of the deceased in the premises *pendente lite*, such executor's sale being made subject to the lien of the prior deed of trust.⁵

§ 576. **Same — Fraudulent Collusion.** — Injunction is the proper remedy to prevent fraudulent and collusive conduct upon the part of an administrator to the injury of the estate which he represents. Accordingly, where an administrator, by collusion with

¹ Owen's Admr. v. Childs, 58 Ala. 113.

² Butler v. Johnson, 111 N. Y. 204.

³ Gunby v. Brown, 86 Mo. 253.

⁴ Denny v. Denny, 113 Ind. 22.

⁵ George v. Cooper, 15 W. Va. 666.

SALE OF INCUMBERED PROPERTY; NEGLECT TO SUBROGATE. — At an administrator's sale of his intestate's real estate for payment of debts, the equity of redemption in land subject to a deed of trust was sold at a nominal price, the purchasers agreeing to pay off the incumbrance; but on their refusal to do this the administrator paid a large part of it out of the assets of the estate, and procured an order for the sale of the remaining real estate, including a residuary interest of the heirs in land set apart as a homestead. Thereupon the intestate's widow and heirs brought suit to restrain such sale, and for other relief, against the administrator, the purchasers of the equity of redemption, and the probate judge. *Held*, that there was no cause of action against any of the parties except the administrator, who might be restrained from proceeding with the proposed sale, because of his failure to enforce his right to subrogation in place of the beneficiaries in the deed of trust, as against the purchasers of the equity of redemption. *Swan v. Thompson*, 36 Mo. App. 155.

other persons, had entered into a conspiracy to procure a sale of the property pertaining to the estate for their joint benefit, and the administrator had allowed fraudulent claims against the estate, to satisfy which he had procured an order for the sale of real estate, he was enjoined from proceeding with the sale at the suit of persons claiming the ownership of such real estate.¹

§ 577. **Same — Defective Conveyance.** — Relief by injunction is sometimes proper in cases of defective execution of powers conferred upon administrators; and the heirs of a deceased person may be enjoined from prosecuting an action of ejectment for the recovery of real estate sold by the administrators of the estate, where one of two administrators has omitted to join in the conveyance. The purchaser, having paid the purchase-money in good faith, is entitled to the aid of equity to relieve against the defective conveyance.²

§ 578. **Same — Relief in favor of Grantees of Heirs and Purchasers at Administrator's Sale.** — The protection against fraudulent acts by the administrator, violative of his trust, will be extended to grantees of the heirs; and the latter may obtain an injunction restraining the administrator from selling the real estate conveyed to them by the heirs where the personal property is sufficient for paying all indebtedness of the estate.* So an injunction is properly granted against an administrator *de bonis non* to restrain him from selling lands which complainant has purchased under a sale by the administrator in chief, made in pursuance of an order of the probate court, the purchase-money having been already paid and applied as assets of the estate.⁴ On this principle grantees of devisees of land may enjoin the executrix of the will from voluntarily exercising her power to sell such land for payment of debts of the testator, which are barred by limitation,

¹ *Larue v. Friedman*, 49 Cal. 278.

² *Wortman v. Skinner*, 1 Beas. 258.

³ *Hill v. Mitchell*, 40 Mich. 389.

⁴ *Bell v. Craig*, 52 Ala. 215.

LACK OF INTEREST OF COMPLAINANT. — The under tutor or guardian cannot maintain an injunction to stay the foreclosure of a mortgage granted by the surviving widow (the mother of the minors) on her behalf of the community property, because he is not the representative of the creditors, nor is he the representative of the residuary interest of the widow in community. *French v. Thompson*, 24 La. An. 285.

such debts constituting no claim against the estate, and it being the executrix's duty to set up the bar.¹

§ 579. **Fraud of Administrator in confessing Judgment.** — A proper case is presented for relief by injunction against an administrator when it is shown that, being sued in a court having no jurisdiction over him, he has accepted service, and permitted judgment to go against him by default, upon an old account against the deceased which has become barred by the statute of limitations ; and a bill to enjoin the judgment at the suit of sureties upon the administrator's bond is properly brought by them, they having sufficient interest in the matter to warrant them in proceeding in equity to have the judgment set aside.²

§ 580. **In favor of Administrator against Judgment.** — An administrator is entitled to an injunction to restrain the enforcement of a judgment against him where, subsequent to the rendering of the judgment, he has discovered set-offs and credits to which his intestate was entitled, of which the administrator, without fault or negligence on his part, was ignorant prior to the judgment being obtained.³ But executors and administrators seeking relief in equity must, like other parties, present an equitable claim for protection or relief. And where an executor has rendered himself personally liable at law, he will not be protected in equity against the judgment at law, on account of such liability.⁴

§ 581. **Relief of Creditors.** — Mere creditors of an estate will not be entitled to an injunction against an executor, except in the case of waste or mismanagement by him, whereby payment of the indebtedness to them is imperilled.⁵ But a creditor of an estate who has duly proven his claim which was allowed by the proper court of probate, may enjoin the executor, who is a mortgagee under a chattel mortgage executed to him by the testator to defraud his creditors, from sale under the mortgage, though the estate is solvent, the executor being also solvent.⁶ And an

¹ *Butler v. Johnson*, 111 N. Y. 204 ; 18 N. E. 643.

ESTOPPEL BY ACQUIESCENCE. — Averments of an irregular sale of lands by administrators, and of acquiescence by the party in interest, will sustain a bill for an injunction against interference by one claiming under the acquiescing party. *Beckham v. Newton*, 21 Ga. 187.

² *Washington v. Barnes*, 41 Ga. 307.

³ *Terrill's Admrs. v. Southall's Exrs.*, 3 Bibb, 458.

⁴ *Burles v. Popplewell*, 10 Sim. 383.

⁵ *Elam v. Elam*, 72 Ga. 162.

⁶ *Becker v. Anderson*, 6 Neb. 499.

injunction is properly granted against executors who refuse to distribute the estate ratably among the creditors, and in accordance with the terms of the devise, and are threatening to secure certain favored creditors not entitled to a preference either at law or in equity.¹

§ 582. **Same — Pending Action for an Accounting.** — Since courts of equity have undoubted power to prevent their decrees from being interfered with, a decree requiring an administrator to render an account will be protected by injunction ; and since the decree is for the benefit of all creditors, and in the nature of an interlocutory judgment in which they all have an interest, the preventive relief will be allowed on the application of either party, in restraint of legal proceedings by any of the creditors against the administrator which may be instituted pending a decree.²

§ 583. **Pendente lite.** — The matters upon which an injunction *pendente lite* will issue in cases affecting administrators and executors must, as in other cases, be immediately connected with the litigation ; and an injunction will not be granted to an executor seeking to enjoin in the same suit the enforcement of a judgment against himself, upon the ground of an agreement by the judgment creditors to look to the testator's estate, and not to the executor personally. The executor must institute a new suit for the purpose.³ While equity will freely interfere to prevent breaches of trust by administrators where necessary for the protection of assets in their hands, pending an action to test their right to administer, yet when they have been regularly appointed by the proper court, equity will not interfere, upon the application of those claiming a superior right to administer, seeking to enjoin the administrator so appointed from proceeding with the administration of the estate.⁴ But an injunction *pendente lite* to restrain an executor from selling real estate to pay the testator's debts is properly granted in favor of heirs-at-law, upon a bill filed by them alleging that the deceased had held in trust for complainants certain moneys, which he had invested in real estate for their

¹ *Depau v. Moses*, 3 Johns. Ch. 349.

² *Brooks v. Dent*, 4 Md. Ch. 473. See also *Thompson v. Brown*, 4 Johns. Ch. 619.

³ *Lucas v. Williams*, 4 De G. F. & J. 436.

⁴ *Maher v. Gorman*, 6 Ir. Eq. 304. See also *Watkins v. Brent*, 7 Sim. 512; *Connor v. Connor*, 15 Sim. 598.

benefit, but had taken title in his own name; the bill also seeking a conveyance of the premises to complainants.¹

§ 584. **Same — Contested Will.** — Where the administrator is acting under an instrument purporting to be a will of the deceased, containing a power to sell the real estate, but the validity of which is questioned, the heirs may enjoin a sale until the validity of such instrument as a will is tested.² An injunction may also be granted to prevent an executor from selling personal property claimed by him as a gift *inter vivos* from the testator; the bill alleging undue influence over the testator in obtaining the gift, as well as in obtaining the execution of a will in the executor's favor.

§ 585. **Where Parties left to Remedies in Court of Probate.** — Equity will not interfere to prevent a threatened sale of lands of the intestate where full relief against such sale may be had upon application to the probate court where the proceedings are had.³ For the same reason, relief by injunction in favor of creditors seeking to enjoin other creditors from obtaining judgment against the executor was refused, the laws of the state giving them the right to contest the priority of claims against the estate in the probate court, after as well as before judgment.⁴ But where the sale was wholly unnecessary, the estate being fully administered and ready for distribution, it was held an administrator might be enjoined from selling the realty, under an order of the ordinary

¹ *McCorkle v. Brem*, 76 N. C. 407; *Galbreath v. Everett*, 84 N. C. 546.

² *Powell v. Hammond*, 81 Ga. 567; 8 S. E. 426; *Edmonds v. Bird*, 1 Ves. & B. 542.

³ *Johnson v. Jones*, 75 N. C. 206; *Bailey v. Ross*, 68 Ga. 735. See also *Sprinkle v. Hutchinson*, 66 N. C. 450; *Burke v. Beall*, 77 Ga. 271; 3 S. E. 155. Where land is conveyed to one who agrees, in consideration therefor, to pay off a judgment, instead of which he takes an assignment of the judgment, and proceeds to enforce the same by levy and sale, the proper remedy is by an affidavit of illegality, and not by injunction. *Flournoy v. Silman*, 59 Ga. 195.

LIABILITY TO RENDER ACCOUNT IN COURT OF PROBATE. — An executrix was entitled by the will to the possession of testator's realty, with the rents and profits, with power to sell in her discretion. In a bill to enjoin her from cutting and selling timber it was alleged that these facts rendered the estate of doubtful sufficiency to satisfy plaintiff's legacies which were charged on the land. *Held*, that, as it was not shown that defendant was acting illegally, or that the value of the estate itself was impaired, and as defendant's interest as legatee was sufficient to cover any damages that might accrue, plaintiffs were not entitled to relief, for they were amply secured in the executorial responsibility of defendant on an accounting. *Keller v. Ogsbury*, 121 N. Y. 362; 24 N. E. 803. See also *Davis v. Cornue*, 37 N. Y. S. 788; 2 App. Div. 220.

⁴ *Turk v. Ross*, 59 Ga. 378.

upon a bill to wind up the affairs of the estate, and for an accounting and distribution;¹ and the decision was reached, notwithstanding a former decision in the same court, that the judgment of the court of probate in ordering a sale cannot be collaterally attacked in a suit for an injunction.²

§ 586. *Defence of Res Adjudicata.* — Where a creditor, in a suit at law against the administrator, relied upon the account of sales of the administrator as evidence of the assets, and a fair trial was had, it was held that he was bound by the verdict, unless he could show that the administrator had deceived him by fraudulent representations, and that he could not come into equity to avoid and enjoin a sale by the administrator, on the ground that he was himself the beneficial purchaser, and that he purchased at an under price.³ On the same principle, where a will was admitted to probate, and on appeal an issue was directed, it also appearing that the executors were also devisees and in possession, it was held that a bill to restrain them from collecting rents, and for the appointment of a receiver, disclosed no equity.⁴

¹ *McCook v. Pond*, 72 Ga. 150.

² *Bailey v. Ross*, 68 Ga. 735.

³ *Wilson v. Leigh*, 4 Ired. (N. C.) Eq. 97.

⁴ *Schlecht's Appeal*, 60 Pa. St. 172.

CHAPTER XIII.

PERTAINING TO PARTNERSHIP.

I. WITHOUT A VIEW TO DISSOLUTION.

II. PENDING AND AFTER DISSOLUTION.

I. WITHOUT A VIEW TO DISSOLUTION.

§ 587. Power to Enjoin without Dissolving no longer disputed.

588. Jurisdiction founded upon the Trust Relation.

589. Acts warranting Interference by Injunction.

590. Same — Withdrawing Partnership Property ; removing Book of Account.

591. Same — Use and Possession of Partnership Property ; Abuse of Firm's Credit.

§ 592. Interference by Third Parties.

593. Same — Creditors.

594. Conveyance taken in Name of Individual Partner.

595. Complainant must not be himself Derelict.

596. Question of Partnership in Dispute ; Relative Inconvenience.

597. Nature of Business — Scope of Authority.

598. Remedy on Partnership Contract.

§ 587. Power to Enjoin without Dissolving no longer disputed. — Anciently courts of equity declined to interfere in partnership affairs, except where dissolution, as well as relief by injunction against further interference with partnership assets, was sought, pending the final hearing or during liquidation after dissolution. But evident as it is that the necessity for applying for relief virtually imperils the success of a partnership enterprise, the jurisdiction to enjoin a partner from doing that which seriously interferes with the business, or which is a breach of the express terms of the co-partnership agreements, on a bill which does not seek a dissolution, is now well established.¹

¹ In *Marshall v. Coleman*, 2 Jac. & W. 266, it was held that an injunction will not be granted to restrain the breach of a covenant in articles of partnership which have been infringed for any length of time, where the bill does not pray a dissolution of the partnership ; and the Lord Chancellor (Lord Eldon) doubted whether the court would in any case grant such an injunction unless there was granted for, and the bill prayed, a dissolution of partnership. Lord

§ 588. **Jurisdiction founded upon the Trust Relation.** — Jurisdiction to grant preventive relief in co-partnership matters, while on occasions it may rest upon one or more of several grounds, is usually due to the trust or contractual relations between the partners, the violation of which will be prevented to avoid irreparable injury and vexatious or interminable litigation. During the continuance of the co-partnership, any act by one or more of the partners, less than all, which is greatly injurious to the common interest, as by indorsing notes in the firm name and the like, will be enjoined, although a dissolution of the co-partnership be not sought in the same bill. If a bill would in no case lie to compel a man to observe the covenants of a partnership deed, unless the bill sought a dissolution of the partnership, it is obvious that a person fraudulently inclined might of his own mere will and pleasure compel his co-partner to submit to the alternative of dissolving a co-partnership, or ruin him by a continued violation of the partnership contract.¹

Eldon in his judgment said: "There is only this point in the case now before me which I wish seriously to consider, viz., that although this court will interfere where there is a breach of covenants in articles of partnership so important in its consequences as to authorize the party complaining to call for a dissolution of the partnership, whether (and it is a matter that will deserve a great deal of consideration before it goes so far) it will entertain the jurisdiction of pronouncing a decree (for this is what is to be done in the cause in which this motion is now made) for a perpetual injunction as to a particular covenant, the partnership not being dissolved by the court. There is one case which is constantly occurring, that of a partner raising money for his private use on the credit of the partnership firm; and the court interferes then, because there is a ground for dissolving the partnership; but then the danger must be such — there must be that abuse of good faith between the members of the partnership — that the court will try the question whether the partnership should not be dissolved in consequence. But it is quite a different thing, and it would be quite a new head of equity, for the court to interfere where one party violates a particular covenant, and the other party does not choose to put an end to the partnership. And (*Forman v. Homfray*, 2 V. & B. 329; *Smith v. Jeyes*, 4 Beav. 508) in that way there may be a separate suit and a perpetual injunction in respect of each covenant; that is a jurisdiction that we have never decidedly entertained." But in *Fairthorne v. Weston*, 3 Hare, 387, it was held that a bill for partnership account and a receiver, during the existence of the partnership, is not demurrable merely on the ground that a dissolution is not prayed. See also *Harrison v. Armitage*, 4 Mad. 143; *Richards v. Davis*, 2 Russ. & My. 347; and the unequivocal expression of the opinion of Lord Cottenham in *Taylor v. Davis*, 4 L. J. (N. S.) Ch. 18; 7 L. J. (N. S.) Ch. 179; 3 Beav. 388, n., 395, n., and in *Wallworth v. Holt*, 4 My. & Cr. 619; of the Vice-Chancellor of England in *Miles v. Thomas*, 9 Sim. 606; of Lord Langdale in *Richardson v. Hastings*, 7 Beav. 301.

¹ *Cropper v. Coburn*, 2 Curt. (U. S.) 565; *Blackford v. Hawkins*, 1 L. J.

§ 589. **Acts warranting Interference by Injunction.** — The acts which will be restrained are such as will work substantial injury to the firm interests, and an injunction will not be granted to prevent the doing or continuance of mere trivial and unimportant acts, which, though annoying and vexatious, do not substantially impede the success of the common enterprise.¹ Some act must be established, as being or about to be done, which is not only injurious to the partnership interest, but inconsistent with the articles of agreement, or the relation and duty as a partner; such, for instance, as engaging in business injurious to the firm;² severing connection with the firm and forming a partnership with a third party;³ wrongfully obtaining a certificate in his individual name for a deposit belonging to the firm and transferring it to a foreign bank;⁴ or conducting the same business for his own benefit at a different place than that agreed upon.⁵ But mere

Ch. 141; *Marble Co. v. Ripley*, 10 Wall. (U. S.) 339; *New v. Wright*, 44 Miss. 202; *Greatrex v. Greatrex*, 1 De G. & Sm. 692; 11 Jur. 1052; *Marshall v. Watson*, 25 Beav. 501; *Morrison v. Moat*, 21 L. J. (N. S.) Ch. 248; 16 Jur. 821; *Charlton v. Poulter*, 19 Ves. 148.

¹ *Goodman v. Whitcomb*, 1 Jac. & W. 392; *O'Bryan v. Gibbons*, 2 Md. Ch. 9; and see *Drury v. Roberts*, 2 Md. Ch. 157; *Moises v. O'Neill*, 8 C. E. Green (N. J.) 207.

² *Benton v. Wookey*, 6 Madd. 367; *New v. Wright*, 44 Miss. 202; *Hall v. Hall*, 12 Beav. 414; *Long v. Majestre*, 1 Johns. (N. Y.) Ch. 305; *Anderson v. Wallace*, 2 Wall. 540; *Marble Co. v. Ripley*, 10 Wall. (U. S.) 339; *Morrison v. Moat*, 21 L. J. (N. S.) Ch. 248; s. c. 16 Jur. 821.

INSANITY OF PARTNER. — Vice-Chancellor Sir W. P. Wood refused a motion for an *interim* injunction to restrain a partner who, six months previously, being temporarily of unsound mind, had attempted to commit suicide, from interfering in the partnership affairs, the evidence not showing that at the time of the motion he was incompetent to conduct the business of the partnership according to the partnership articles; but granted a motion in a cross-suit to restrain the defendants in such cross-suit from preventing the partner who was insane from transacting the business of the partnership as a partner thereof. The circumstances that the conduct and state of mind of the partner in question were such as at once to destroy the confidence of the other partners, and to induce customers to withdraw custom from the firm, and that the malady under which he labored might as easily have led him to attempt the life of one of his partners, were held not to furnish sufficient ground for granting the first motion. *Anon.* 2 K. & J. 441.

³ *England v. Cushing*, 8 Beav. 129; *Buxton v. Liste*, 3 Atk. 385.

⁴ *Grobe v. Roup*, (W. V. A.) 28 S. E. 699.

⁵ *Marshall v. Johnston*, 33 Ga. 500. See also *Petty v. Hardware Co.*, 99 Ga. 300; *Supreme Court of Independent Order of Foresters v. Order of Foresters*, 94 Wis. 234.

temptation to the abuse of partnership obligations is not sufficient to induce the court to grant an injunction.¹

§ 590. **Same — Withdrawing Partnership Property; removing Book of Account.** — An injunction will be granted to restrain a member of a co-partnership who holds notes for the benefit of the firm from pledging them for his own private debts;² and an injunction will be granted to prevent the disposal by a partner of specific articles of property belonging to the co-partnership, pending litigation for a settlement of the business.³ So one member of a firm engaged in business may be enjoined from using force, to the obstruction or interruption of the trade, such, for instance, as displacing servants employed by the other partners, and from withdrawing from the places where properly kept the books and papers relating to the business.⁴

§ 591. **Same — Use and Possession of Partnership Property; Abuse of Firm's Credit.** — The court will restrain a partner from doing an intentional serious injury to the partnership property. An injunction will be granted where one partner excludes his co-partners from the premises where the firm business is being conducted, and from participation in the business; and in such case the defendant will be enjoined from receiving and collecting debts due the firm.⁵ And sufficient ground for the granting of

¹ *Smith v. Mules*, 9 Hare, 556. In this case all the partners in a publication (a morning newspaper), except one, being also partners in another publication (an evening newspaper), and as to which circumstances, between two such publications, the Vice-Chancellor observed there is necessarily some rivalry, an injunction to restrain the using of the effects of the former partnership to assist the latter, in consideration of an annual sum, was refused where had been an agreement permitting the use on those terms, which had been acted on for many years; but the injunction was granted to restrain the use of partnership effects not included in the agreement.

² *Stockdale v. Ullery*, 37 Pa. St. 486, holding also that such acts were within the spirit and intendment of a statute authorizing injunctions to restrain acts "contrary to law."

³ *Ellis v. Commander*, 1 Strobb. Eq. 188.

⁴ *Brewer's Case*, 19 Ves. (2d Ed.) 148, n.; *Taylor v. Davis*, 3 Beav. 388, n. In *Greatrex v. Greatrex*, 1 De G. & Sm. 692, the court granted an injunction to restrain the defendant, who had removed the partnership books from the place of business, from keeping them at any other place.

⁵ *Walbert v. Harris*, 3 Halst. (N. J.) 605; *Hall v. Hall*, 12 Beav. 414. In *Anderson v. Wallace*, 2 Moll. 540, the court granted an injunction against a co-partnership interfering in the management of the business (which under a contract with the Postmaster-General for the service of the mail), where the effect of suffering him to interfere would be irreparable injury to the partnership business, by causing the contract to be put an end to.

an injunction and appointing a receiver is shown by a bill which alleges the refusal by partners to permit an examination by their co-partner of their books of account; their giving the firm notes in settlement of debts not owing by the firm, and refusal by them to apply the co-partnership funds to the settlement of the firm's indebtedness.¹ On the same principle a partner may have enjoined a co-partner and a third party who are doing, or are about to do, an act injurious to the business credit of the firm; such, for instance, as fraudulently making or indorsing negotiable paper in the firm name for individual benefit.²

§ 592. **Interference by Third Parties.** — Since the jurisdiction in partnership matters is based to a great extent upon the trust relation between the parties, relief will not be extended to parties not in any way connected with, or interested in, the conduct of the partnership enterprise, unless their claim to relief, or the claim against them, is based upon independent grounds, such as would warrant relief against the partners or others in their individual capacities. Accordingly, an injunction was refused, in a suit between partners for a settlement of firm affairs, against a third party not shown to be in any manner connected with the partnership affairs, restraining him from using or disposing of real estate to which he had a legal title, upon an allegation that it was transferred to him fraudulently by one of the partners.³ But on the ground, not of a violation of any trust relation, but because of the irreparable injury likely to result, the holding out of a person as a partner by another, without the former's consent or authority, was held to warrant an injunction.⁴ On the other hand, one will be enjoined from intruding into the place of busi-

¹ *Shannon v. Wright*, 60 Md. 520.

² *Hood v. Aston*, 1 Russ. 412; *Read v. Bowers*, 4 Bro. C. C. 441; *Jervis v. White*, 7 Ves. 413; *Williams v. Bingley*, 2 Vern. 278. An execution upon a judgment confessed by one partner against the firm, without the consent of the co-partners, will be perpetually enjoined. *Christy v. Sherman*, 10 Iowa, 535.

³ *McKee v. Griffin*, 23 La. An. 417.

NOTE FRAUDULENTLY OBTAINED. — A. sold his interest in a partnership to his partner B., and for a balance of payment took B.'s notes to C., who surrendered A.'s notes to the same amount. Before the maturity of the notes, B. discovered that the representations on which he bought the interest were fraudulent, and notified C. that he should not pay the notes. It was held that C., not being cognizant of the fraud, could not be restrained from collecting the notes. *Outhwite v. Porter*, 13 Mich. 533.

⁴ *Routh v. Webster*, 10 Beav. 561.

ness of a co-partnership and holding himself out as one of the firm.¹ And a purchaser at a sale, under a judgment obtained in an action against an individual partner, was enjoined from proceeding in an action of ejectment against the complainants (members of the firm of which such partner was one), who were in possession of premises adjudged to be partnership assets by a decree of the court.²

§ 593. **Same — Creditors.** — The same general rule applies to creditors as to others not directly connected with the partnership enterprise. They cannot interfere or be interfered with, with respect to their demands against the partnership or individual members, except upon equitable grounds distinct from the trust relation between the partners. A court of equity will not enjoin a sale under an execution of the interest of an individual partner in a firm for his individual debt, unless necessary to enable an account to be taken in order to ascertain such partner's interest.³ It will not be granted in order to give an opportunity to liquidate the partnership affairs.⁴ Nor will an injunction be granted, at suit of creditors who cannot be affected by the proceedings, under an execution, unless they can show that the sale will be conducted so as to cause them irreparable injury with respect to their claims against the co-partnership.⁵ And an injunction was

¹ De Groot v. Peters, 57 P. 209; 124 Cal. 406.

² Ettenborough v. Bishop, 26 N. J. Eq. 262. In this case the action in which the judgment was obtained was commenced after the suit in which the premises were declared to be partnership assets was begun, and a notice of *lis pendens* was filed before the commencement of the action. It was held, on motion to dissolve, upon answer, that the defendant having had constructive notice of complainant's claim (and, apparently, actual notice also), the injunction should be retained.

³ Place v. Sweetzer, 16 Ohio St. 142; Sutcliffe v. Dohrman, 18 Ohio, 181, *contra*, Young v. Frier, 9 N. J. Eq. (1 Stock.) 465; Williams v. Lewis, 115 Ind. 645.

⁴ Moody v. Payne, 2 Johns. Ch. 548; Wickham v. Davis, 24 Minn. 167. In the first of these cases Chancellor Kent refused to grant the relief, and in delivering the opinion said: "I do not know that this court has ever undertaken to stop an execution at law, in such a case, until the partnership accounts have been taken, and it would be too much for me to assume it without precedent. The principle would go to stay executions at law, in every case, against the partnership property of one partner who owed separate debts, until the disclosure and liquidation of the concerns of the co-partnership. This would produce inconceivable delay and embarrassment in respect to separate creditors."

⁵ Saunders v. Irwin, 17 Hun, 842.

refused where sought for the purpose of restraining the sale of a locomotive owned by three railroad companies in partnership under a judgment against one of the companies.¹ Nor will a levy by an individual creditor on partnership property be enjoined simply because the property was advanced to the firm in its business of farming, and was necessary to the successful cultivation of the crop;² nor does the payment of a note given by one partner to another out of partnership assets, pursuant to an agreement between the parties, or the failure of the payee to apply such assets to its payment, create such equities in favor of the maker as to entitle him to an injunction against an action on the note in another state pending a suit for an accounting.³ But where a debt was contracted fraudulently, an individual partner and the creditor participating in the fraud, the latter will be enjoined from prosecuting an action commenced by attaching the partnership property.⁴

§ 594. **Conveyance taken in Name of Individual Partner.**—Where one member of a partnership, holding the title of real estate belonging to the firm, attempts to convey it in satisfaction of his individual indebtedness, a court of equity will, on proper application, restrain him from doing so.⁵ But an injunction which had been allowed on the allegations in a bill that complainant and two of the defendants were partners and purchased lands for partnership purposes, and that the defendants fraudulently and without the knowledge and consent of the complainant

¹ *Lamoille Valley R. R. Co. v. Bixby*, 55 Vt. 235. Although, as a rule, the rights of partnership creditors are superior to those of individual creditors, an injunction will not be granted where equities are equal. *Id.*

² *Daniel v. Owens*, 70 Ala. 297.

³ *Donnelly v. Morris*, 13 N. Y. S. 427.

⁴ *Jennings v. Whittemore*, 2 Thomp. & C. (N. Y.) 377. In this case the facts and the conclusions of the court thereon were as follows: E. and W. conspired to have a debt owed by E. to W. paid with the assets of a firm in which E. was a co-partner, and E. gave W. the firm note for that purpose. W. began an action upon the note, and procured an attachment against the firm property. Plaintiffs, who were the remaining members of the firm, began an equitable action, setting forth the above facts and the insolvency of the firm, and asking that such firm be dissolved, a receiver appointed, an accounting had, and that W. be restrained from interfering with the partnership effects, and that this attachment be declared a lien upon the interest of E. only. It was held: 1. That an objection that plaintiffs had an adequate remedy at law could be taken only by demurrer or answer. 2. That plaintiffs were entitled to the relief demanded. 3. That W. was a proper party defendant.

⁵ *Frankenstein v. North*, 79 Ill. App. 669.

took the conveyances in their own names, and on the dissolution of the partnership sold and mortgaged the lands to the other defendants, was dissolved after answer alleging that the defendants were employed at wages to be measured by a proportion of the profits, and denied that the title was taken in the names of the defendants without the knowledge of the complainant.¹

§ 595. **Complainant must not be himself Derelict.** — A partner seeking the extraordinary remedy by injunction against his co-partners will be denied relief if it be shown that he has not himself performed the duties imposed upon him by the terms of the partnership articles, but has violated or departed from them.²

§ 596. **Question of Partnership in Dispute — Relative Inconvenience.** — An injunction should not be perpetuated where at the hearing any doubt remains as to whether a partnership exists; but in a proper case a temporary injunction may be granted pending a determination of that question, though in dispute, if necessary to prevent irreparable injury or multiplicity of suits.³ An injunction will not be granted however, in the first instance, when all the equities of the bill are denied,⁴ or where it would be of no avail or would cause a disproportionate injury or inconvenience beyond the particular exigency against which relief is sought.⁵

§ 597. **Nature of Business — Scope of Authority.** — In determining upon the justice and propriety of granting or withholding an injunction, the court will examine the scope of authority conferred by the articles upon the partners, as well as the nature of the business for which the co-partnership was formed and in which it is engaged; and where the question is whether an individual partner has authority to sell all the property of the firm, an injunction may be granted if the business is such that continuous ownership of the property is essential to the success of the partnership enterprise, as where the business is that of conducting a newspaper.⁶

§ 598. **Remedy on Partnership Contract.** — The insertion in

¹ *McMahon v. O'Donnell*, 20 N. J. Eq. (5 C. E.) Gr. 306.

² *Smith v. Fromont*, 3 Swanst. 330.

³ *Coville v. Gilman*, 13 W. Va. 314.

⁴ *Wellman v. Harker*, 3 Oreg. 253.

⁵ *Smith v. Fromont*, 2 Swanst. 330.

⁶ *Sloan v. Moore*, 37 Pa. St. 217.

co-partnership articles of a provision for the adjustment and settlement of controversies between the partners may warrant a court of equity in refusing relief by injunction until they have availed themselves of the remedy so provided.¹ And where an injunction has been granted to restrain a partner from interfering with the partnership rights of another, it will be dissolved upon its being shown that the partnership has been dissolved by mutual consent.²

II. PENDING AND AFTER DISSOLUTION.

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| <p>§ 599. Dissolution, Injunction, and Receiver.</p> <p>600. Facts warranting Injunction and Receiver.</p> <p>601. The two Remedies not Inseparable.</p> <p>602. Facts warranting Injunction, etc., with view to Dissolution.</p> <p>603. Injunction extended to Parties in Possession of Firm Assets.</p> | <p>§ 604. Pertaining to Possession after Injunction and Receivership.</p> <p>605. Same — Upon Bankruptcy.</p> <p>606. Collecting and intermeddling with Assets.</p> <p>607. In favor of Executor and Administrator of deceased Partner.</p> <p>608. Firm Name and Good-will of Business upon Dissolution.</p> |
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§ 599. **Dissolution, Injunction, and Receiver.** — Although the granting of an injunction and appointment of a receiver in partnership matters are distinct remedies, yet when the dissolution of a partnership is decreed on account of disagreements among the partners, it is the usual, and in fact may be said to be the invariable practice of courts of equity, to appoint a receiver to wind up the business; and the granting of an injunction restraining the partners from further participating in the business or dealing in the firm property follows the appointment of a receiver as a matter of course.³

§ 600. **Facts warranting Injunction and Receiver.** — But the appointment of a receiver and granting of an injunction in the first instance are not warranted in partnership cases unless the complaint shows such a state of affairs as, being established in evidence at the hearing, will entitle complainant to a decree dissolving the co-partnership. And in determining the question thus presented, the court should take into consideration not only the specific terms of the contract between the partners, but

¹ *Carlen v. Drury*, 1 Ves. & B. 154; *Burhans v. Jefferson*, 76 F. 25; 22 C. C. A. 25.

² *Van Kuren v. Trenton Company*, 2 Beas. 302.

³ *Van Rensellaer v. Emery*, 9 How. Pr. 135.

also the duties and obligations which are incident and implied in every such undertaking and relation.¹ And since the injunction is granted upon the appointment of a receiver to preserve the partnership property from waste, the injunction is regarded as auxiliary to the principal relief, therefore, upon the removal of the receiver and appointment of another, the injunction originally granted will be continued almost as a matter of course.² But where a temporary injunction has been granted pending an application for the appointment of a receiver and at the hearing the appointment of a receiver is refused, the injunction must be dissolved.³

§ 601. **The two Remedies not inseparable.** — On the other hand, the appointment of a receiver is not necessarily adjunctive to the granting of a preliminary injunction upon *ex parte* application with a view to dissolution. And, as has been previously stated, the case presented may entitle a party to an injunction though no dissolution is contemplated. The appointment of a receiver in such case would be equivalent to a dissolution against the will of both parties to the proceeding. But where it is apparent that the conduct of a partner defendant has been such as to destroy that mutual confidence and respect between the partners which is an essential element of success of the partnership enterprise, that fact will go far to induce the appointment of a receiver and granting an injunction.⁴

§ 602. **Facts Warranting Injunction, etc., with View to Dissolution.** — Where a partner has failed to contribute his share to the capital stock of the firm as agreed by the articles, and has sold his interest in the firm to a third party without the knowledge and consent of the other partner, and refuses to pay any of the indebtedness of the firm considered in connection with his insolvency, and that his vendee has taken possession of the firm assets, clearly warrants an injunction and receiver.⁵ And where the disagreements between the partners, as disclosed by the pleadings, appear to be serious and irreconcilable, and it also appears that such disagreements relate to the control and dispo-

¹ Smith v. Jeyes, 4 Beav. 508.

² Williamson v. Wilson, 1 Bland, 418.

³ Walker v. House, 4 Md. Ch. 39.

⁴ Smith v. Jeyes, 4 Beav. 503.

⁵ Heathcot v. Ravenscroft, 2 Halst. Ch. 118.

sition of the partnership property and effects, and to their respective demands against the partnership property and against each other, the appointment of a receiver and granting of an injunction are entirely proper.¹ So where the acts of the defendant partner clearly evince a deliberate determination to break up and ruin the firm business, and it is apparent that his conduct has produced such personal relations between the partners that they cannot carry on the business with mutual advantage and profit, a proper case is presented for a receivership and injunction.²

§ 603. *Injunction extended to Parties in Possession of Firm Assets.* — And where a partnership might, by the articles of agreement, be dissolved at the pleasure of either partner, and has been, in fact, dissolved, on account of the insolvency of some of the members, who were about to appropriate the firm assets to the payment of their private debts, by an assignment thereof for the benefit of creditors; an injunction was granted and a receiver appointed, and extended to cover all the firm assets in the hands of the assignee, as well as those still in the possession of the insolvent partners, in order to prevent misappropriation and loss to the complainant partner and the firm creditors.³

§ 604. *Pertaining to Possession after Injunction and Receivership.* — Where, in an action for dissolution and settlement of partnership business, a defendant partner sets up an individual claim to property in his possession, which claim is disputed, an injunction may still be made to cover such property, and the receiver directed to take charge of it, if it sufficiently appears that it was in part payment upon a sale of partnership property, and the complainant partner shows the defendant to be insolvent; also, that he has acted in bad faith, and that he has disposed of part of the partnership property with intent to defraud the firm creditors. The defendant in such case should be left to show, if he can, at a later stage of the proceedings, that the property in dispute is, in fact, his individual property.⁴ The insolvency of a partner left in control of the business of a partnership after its

¹ *Whitman v. Robinson*, 21 Md. 30; *Shannon v. Wright*, 60 Md. 520.

² *Sutro v. Wagner*, 8 C. E. Green, 388.

³ *Davis v. Grove*, 2 Rob. (N. Y.) 134.

⁴ *Saylor v. Mockbie*, 9 Iowa, 209.

dissolution, may alone be sufficient to warrant the appointment of a receiver and granting an injunction. The insecurity of the assets in the hands of an insolvent member of the firm, is the ground of equitable interference in such case.¹

§ 605. **Same — Upon Bankruptcy.** — The power and authority of a sole solvent partner, upon the bankruptcy of his co-partner, to get in and sell the partnership assets, are vested in him personally for partnership purposes, to enable him to wind up the affairs of the partnership, and cannot be transferred by him to another, either by assignment of "all his share and interest" in the partnership, or by exposing himself, although *bona fide*, to a judgment, under which all such share and interest is taken in execution.² And where, under a deed of partnership, it was provided that the assignees of any bankrupt proprietor should not become proprietors, but they might procure some person to become a proprietor in respect of the bankrupt's shares, and that between the time of the bankruptcy and of some person becoming a proprietor of such shares, the right and privileges attending such shares should remain in suspense, the court held that the solvent proprietors were entitled to an injunction against the assignee of a bankrupt proprietor, to restrain him from interfering with the partnership property; but, the solvent proprietors being entitled to the possession of the partnership property and effects, a manager or receiver was refused.³

§ 606. **Collecting and Intermeddling with Assets.** — After dissolution an injunction will be granted to restrain a member of the late firm, not authorized to settle the business, from interfering with the assets.⁴ Such interference will also be enjoined after the appointment of a receiver.⁵ And an injunction issued on a bill for an accounting by a member of a dissolved firm, against his late co-partner, restraining the latter from collecting partnership money, or intermeddling with the partnership con-

¹ *Randall v. Morrell*, 2 C. E. Green, 343. See also *Serghortner v. Weisenborn*, 5 C. E. Green, 172.

² *Fraser v. Kershaw*, 2 K. & J. 496; 2 Jur. (N. S.) 880; 24 L. J. Ch. 445.

³ *Francis v. Spittle*, 9 L. J. (N. S.) Ch. 230.

⁴ *Smith v. Danvers*, 5 Sandf. 669. See also *Van Rensselaer v. Emery*, 9 How. Pr. (N. Y.) 135; *Crawford v. Alexander*, 15 Ves. 138; *Williams v. Bingley*, 2 Vern. 278; *Garrettson v. Weaver*, 3 Edw. (N. Y.) Ch. 885.

⁵ *Van Rensselaer v. Emery*, 9 How. Pr. (N. Y.) 135; *Holden's Admrs. v. McMakin*, 1 Par. (Pa.) 270. See *Dunn v. McNaught*, 38 Ga. 179.

cerns, may be continued until the hearing, where the defendant does not deny the statements of the bill that he refuses to account; and the written statement made by him and set out in the bill, that he has no interest in the assets, and the claims of his answer as to capital contributed by him, are not substantiated by those statements.¹ On like principle, where a partnership has been dissolved, and the remaining partner is selling goods of the firm, for which the purchase-price is owing, there is no abuse of judicial discretion in enjoining such sales and appointing a receiver, on the filing of a creditor's bill, on condition that the debtor may, by giving bond, retain possession and continue the sales.²

§ 607. **In favor of Executor or Administrator of Deceased Partner.** — The representatives of a deceased partner may have a surviving partner enjoined from misapplying the funds of the firm or otherwise abusing his powers or authority in the disposition of the property.³ And where a co-partnership is dissolvable at will, there being no partnership articles and no agreement for a continuation of the business by the personal representatives of a deceased partner upon the death of one of the partners, if the surviving partner does not within a reasonable time proceed to close up the affairs of the firm, but continues the business in his own name and interest, a court of equity will, upon a bill brought by an administrator of the deceased partner, enjoin a continuation of the business, and appoint a receiver to take charge of the assets and wind up its affairs.⁴

¹ *Large v. Ditmars*, 27 N. J. Eq. 283.

OPENING MAIL. — A bill alleged that complainant and defendant had done business under an agreement whereby defendant was to furnish stone from his quarry, to be manufactured at plaintiff's mill; that the product was to belong to plaintiff, who was to have sole control of the finances of the business; that defendant was to sell the products, and receive a commission thereon; that the business was done under an assumed name; that the business was ended; and asking that defendant be enjoined from receiving the mail relating thereto, and making collections. *Held*, that the preliminary injunction should not be dissolved; but, as defendant had done business under the same name since the old business was ended, a disinterested person would be appointed to receive the mail, and deliver it to the proper party. *Wagoner v. Warne*, (N. J.) 14 A. 215.

² *Baker v. Mills*, 81 Ga. 342; 9 S. E. 1100.

³ *Marshall v. Coleman*, 2 Jac. & W. 266; *Deveau v. Fowler*, 2 Paige, (N. Y.) 400; *Hartz v. Schroder*, 8 Ves. 3317.

⁴ *Holden's Admrs. v. McMakin*, 1 Par. (Pa.) 270.

§ 608. Firm Name and Good-will of Business upon Dissolution.

— Upon sale of the entire business, the use of the firm name being included among the assets, a partner of the original firm may be enjoined from using it in business.¹ And upon a dissolution and sale and transfer by retiring partners, to other members of the firm, of all the property of the firm without mention of the good-will, neither of the continuing partners, nor their assignees, can so use the old firm name as to give third persons good cause for believing that the retiring partners are still connected with the business, and in such cases an injunction will be granted against the unauthorized use of the name.² Upon the same principle a partner after dissolution was enjoined from publishing letters relating to the firm business.³ But a partner who has been expelled under a provision in the articles of partnership, and has been repaid his share of the capital, will not be restrained from carrying on the business on his own account, and soliciting the old customers of the firm.⁴

¹ *Banks v. Gibson*, 34 Beav. 566 ; *Brass & Iron Works Co. v. Payne*, (Ohio Sup.) 33 N. E. 88. See *Binninger v. Clark*, 60 Barb. (N. Y.) 113; s. c. 10 Abb. Pr. n. s. (N. Y.) 264; *Wormser v. Levy*, 59 N. Y. Super. Ct. 1; *Lewis v. Langdon*, 7 Sim. 422; *Whittaker v. Howe*, 3 Beav. 383. Where a partnership was carried on for fourteen years between B. & G., under the style of "Banks & Co.," and on the dissolution the assets were divided, but no arrangement was come to as to the style; the Master of the Rolls held that the name or style of "Banks & Co." formed an undivided asset of the partnership, which belonged to the partners in common after the dissolution, and that B. was not entitled to prevent G. using the style of "B. & Co." in his business. *Banks v. Gibson*, *supra*. In England *v. Curling*, 8 Beav. 129, the Master of the Rolls, Lord Langdale, granted an injunction to restrain a partner during the partnership term, from carrying on business with other persons in the name of the old firm, and from publishing notice of dissolution.

² *McGowan, etc. Co. v. McGowan*, 22 Ohio St. 370. See *Williams v. Wilson*, 4 Sandf. (N. Y.) Ch. 380.

³ *Roberts v. McKee*, 29 Ga. 161.

⁴ *Dawson v. Beeson*, L. R. 22 Ch. Div. 504.

CHAPTER XIV.

AGAINST PUBLIC OFFICERS.

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| <p>§ 609. For what Causes granted.</p> <p>610. Only granted to restrain Positive Breaches of Duty.</p> <p>611. Acts Legally Authorized not Interfered with.</p> <p>612. Statutory Provisions.</p> <p>613. Unconstitutional Statute.</p> <p>614. Acts detrimental to Public — Suit by Private Party.</p> <p>615. Same — Early Views to the contrary.</p> <p>616. Same — Where Injury must be shown.</p> <p>617. Exercise of Judicial and Discretionary Powers not enjoined — County Boards.</p> <p>618. Same — Other Bodies.</p> <p>619. Abuses of Discretion enjoined.</p> <p>620. Not granted to try Title to Office.</p> <p>621. Incumbent protected from Intrusion and Interference.</p> <p>622. Same — Pending Contest.</p> <p>623. Executive State Officers.</p> <p>624. Same Subject — Relief granted.</p> <p>625. Same — Relief refused.</p> | <p>§ 626. Existence of Legal Remedies.</p> <p>627. Same — Various Remedies.</p> <p>628. Exercise of Police Powers not interfered with.</p> <p>629. Not granted when ineffectual.</p> <p>630. Acts pertaining to Elections rarely enjoined.</p> <p>631. Same — No Interference by Federal Court with State Election Officers.</p> <p>632. Illegal Sale and Transfer of Property.</p> <p>633. Illegally paying out Money.</p> <p>634. Removal of County Seat.</p> <p>635. Taking and injuring Property under Color of Office.</p> <p>636. Illegal Use of Legal Process — Remedy by applying to same Court.</p> <p>637. Same — Where Relief granted.</p> <p>638. Same — Process from United States Courts.</p> <p>639. Imminency of Danger authorizing Injunction.</p> <p>640. Modified Relief.</p> |
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§ 609. For what Causes granted. — The general rule governing the jurisdiction in equity against public officers is that equity will interpose in behalf of individuals to restrain all illegal and unauthorized acts by them under color and claim of official authority which tend to impair public rights or will result in irreparable or serious injury to private citizens, or when preventive relief is necessary to prevent a multiplicity of suits.¹ A

¹ Green v. Green, 34 Ill. 320; Mohawk & H. R. Co. v. Artchter, 6 Paige, 83. See also Shaefer v. Commissioners of Schuylkill County, 19 Pa. Co. Ct. R. 508; Carline v. Shallenberger, (Pa. Com. Pl.) 13 Pa. Co. Ct. R. 145; Webster v. Douglas County, (Wis.) 77 N. W. 885; Balogh v. Lyman, 39 N. Y. S. 780; 6 App. Div. 271; Blanton v. Southern F. Co., 77 Va. 335; Green v. Oakes,

court of equity only exercises its peculiar jurisdiction over public bodies and public officers to prevent a breach of trust affecting public franchises, or some illegal act under color or claim of right affecting injuriously the property rights of individuals; and to authorize the issuing of an injunction not only must a clear, legal, and equitable right to the relief demanded be shown, but it must also appear that such a breach of trust or illegal act is being done by defendant, or is threatened and imminent.¹

§ 610. **Only granted to restrain Positive Breaches of Duty.**—An injunction will be granted only to prevent the violation of a positive right. And where commissioners were appointed by statute to ascertain who were entitled under a pre-emption law, the court refused to grant an injunction at the instance of one who claimed to be injured by their decision, as it was a mere matter of favor, and not of right.² And mere negligence in a matter of official routine, though under the proceeding by virtue of which an officer's claim to act be irregular, will not warrant an injunction against him. Thus, under a statute providing for the appointment by the county court of a board of medical examiners, it was held that a failure to notify a member of the board of the time and place of organization thereof was no ground for enjoining the board from discharging its appropriate functions.³ On the same principle an injunction was refused where sought against the governor of a state to restrain him from acting on the return and report of a census taker, in proceedings for the

17 Ill. 249. Laws Del. c. 8, section 21, provides that at a meeting in March in every year the levy court shall examine and adjust the accounts of tax collectors, making all just allowances for delinquents, and the adjustment and allowances shall be final. *Held*, that where such adjustment and allowances have been made, and subsequently a judgment has been obtained against such collector and his sureties, on his official bond, an injunction will be issued at the prayer of one of the sureties to restrain the clerk of the levy court from altering the entries made by him upon the assessment list or list of delinquent taxables allowed by said court. *Mealy v. Buckingham*, (Del. Ch.) 22 A. 357. The limits upon the power of a court of equity to restrain acts of a public or corporate officer, — explained. *People v. Albany, etc. R. R. Co.*, 55 Barb. (N. Y.) 344; 7 Abb. (N. Y.) Pr. n. s. 265; 38 How. (N. Y.) Pr. 228.

¹ *People v. Canal Board*, 55 N. Y. 394. See also *Atty.-Gen. v. Forbes*, 2 Myl. & Cr. 123; *Ohio v. Chase*, 5 Ohio St. 528.

² *Bell v. Payne*, 2 Stew. (Ala.) 414. Compare *Kisling v. Johnson*, 13 Cal. 56; *Smith v. Bango*, 15 Ill. 399.

³ *Howard v. Parker*, 49 Tex. 236. See also *Cooney v. Gardner*, (Com. Pl.) 16 Pa. Co. Ct. R. 547; *Plessner v. Pray*, 8 Ohio Com. Pl. 149.

organization of a new county, the petition alleging fraud on the part of the census taker and others, but not that the fraud was ever brought to the attention of the governor, or that he refused an investigation of it under the statutes.¹

§ 611. **Acts legally authorized not interfered with.** — It is another well-established rule that injunction will not issue to prevent officers from doing acts authorized by valid laws, enacted with a view to promoting the public welfare, whatever the opinion of the court as to the wisdom or expediency of such laws.² Thus, where commissioners, appointed under an act of the legislature to drain swamp lands, are acting in good faith, without violating the plain and manifest intent of the statute, a court is not justified in restraining their proceedings by the process of injunction.³ Nor can county commissioners be enjoined from doing official acts unless it appears that they are proceeding without authority; nor does an injunction lie against the commissioners of pilots, acting within the terms of a statute, to restrain their removing obstructions in navigable waters.⁴ But courts have undoubted jurisdiction to interfere by injunction, where public officers are proceeding illegally and improperly, under a claim of right, to do any act to the injury of the rights of others.⁵ And commissioners authorized to make a street improvement may be restrained from committing any abuse of their trust; but the court cannot inquire into the motives which

¹ *Martin v. Ingham*, 38 Kan. 641; 17 Pac. 162.

² *Southern Min. Co. v. Lowe*, (Ga.) 31 S. E. 191; *Ladd v. City of Boston*, (Mass.) 49 N. E. 627; *Fairfield Floral Co. v. Bradbury*, 89 F. 393; *State v. Herreid*, (S. D.) 71 N. W. 319; *Brower v. Commissioners of Schuylkill Co.*, 7 Pa. Dist. R. 701; *Commissioners of Chatham County v. Thorne*, 23 S. E. 184; 117 N. C. 211; *Predigested Food Co. v. McNeal*, (Super. Ct. Cin.) 4 O. L. D. 856; *New Orleans City & L. R. Co. v. State Board of Arbitration*, 17 So. 418; 47 La. An. 874; *Cumming v. Board of Education*, 175 U. S. 528.

³ *Hartwell v. Armstrong*, 19 Barb. (N. Y.) 166.

⁴ *Moore v. Commissioners of Pilots*, 22 How. (N. Y.) Pr. 184.

COMMISSIONERS OF EMIGRATION. — Under N. Y. Laws 1865, — making it the positive duty of the commissioners of emigration to designate a place they deem proper for an emigrant landing, and declaring that it shall be lawful for them to be landed there, — the establishment of such a landing by the commissioners cannot be enjoined, even if it is shown that it would prove to be a nuisance. *Phoenix Bank v. Commissioners of Emigration*, 12 How. (N. Y.) Pr. 1; 1 Abb. Pr. 466.

⁵ *Cooper v. Alden*, Harr. (Mich.) 72. See also *Mohawk, etc. R. R. Co. v. Artchter*, 6 Paige (N. Y.), 83; *Sherwood v. Connolly*, 35 How. (N. Y.) Pr. 124; *Baltimore v. Porter*, 18 Md. 284.

induced the legislature to confer the power, or the expediency of conferring it.¹

§ 612. **Statutory Provisions.** — Various statutes have been enacted in the respective states affecting the jurisdiction pertaining to the present subject; but usually they are confined to regulating in matters of practice. A statute providing that “an injunction shall not lie to prevent the execution of a public statute by officers of the law for the public benefit”² does not diminish the powers already possessed by courts of equity herein, as is shown, in the preceding section, for they never assumed any such power. Such a limitation does not extend to acts done under a mere pretence and color of statutory authority, and was held not to prohibit an injunction against the erection of a wharf on plaintiff’s land, as no public statute authorized the taking of land without proceedings under eminent domain.³ But it was held in another case that when a county board have acted in good faith in ordering a county-seat election under the California County Government Act, they cannot be enjoined from publishing the result, whether the election was in fact legal or not.⁴ The latter decision may, however, be very properly based upon the uniform refusal of courts of equity to interfere in matters pertaining to elections,⁵ and is not

¹ *Greaton v. Griffin*, 4 Abb. (N. Y.) Pr. N. s. 310.

² Cal. Civ. Code, § 3423.

³ *Payne v. English*, 79 Cal. 540; 21 P. 952. See also *Montague v. Horton*, 12 Wis. 599, where it was held that Wis. Code of Pro. has not enlarged or changed power of courts of equity to grant injunctions upon the official acts of public officers, except as provided in Rev. Stat. ch. 129, sec. 2, with reference to temporary injunctions pending litigation, which applies to all actions, whether heretofore denominated legal or equitable. But in *Thompson v. Commissioners of Canal Fund*, 2 Abb. (N. Y.) Pr. 248, it was held that an injunction cannot be granted to restrain the acts of officers of the state, who are proceeding under the authority of the law of the state; not even though the judge to whom the application is made deems the statute unconstitutional. Under Gen. St. Ky. c. 81, § 17, which provides that “unless, in a direct proceeding against himself or his sureties, no fact officially stated by an officer in respect of a matter about which he is by law required to make a statement in writing, either in the form of a certificate, return, or otherwise, shall be called in question except upon the allegation of fraud in the party benefited thereby, or mistake on the part of the officer,” a person against whom a judgment for a fine has been rendered under an indictment may maintain a suit to restrain its enforcement, on the ground that the sheriff made a mistake in returning the summons served on petitioner, when in fact he was not served. *Bramblett v. McVey*, (Ky.) 15 S. W. 49.

⁴ *People v. Board Sup’rs*, (Cal.) 16 P. 776.

⁵ *Infra*, § 630.

inconsistent with the view above taken as to such statutes; besides it was the exercise of a discretionary function conferred by law.

§ 613. **Unconstitutional Statute.**—In this connection an unconstitutional statute is generally regarded as if no such statute existed. But that is not alone ground for injunction against the performance of official acts under its provisions; and where that appears as the only ground of complaint courts of equity await a decision at law on the validity of the statute.¹ But equity will interfere where, in addition to the unconstitutionality of the statute, other grounds for relief in equity are shown.² Accordingly, the court should grant an injunction against a county treasurer who seeks to collect a tax on banks, under a law which has been held unconstitutional, for there is no other adequate remedy for such annual abstraction of bank funds.³ So where a county is established by the legislature in violation of the constitution, although a writ of *quo warranto* is a proper remedy to redress the grievance, it has been held that equity would interfere by injunction to prevent an organization of the county, on the principle of *quia timet*, and to prevent great and irreparable injury. In such case any person aggrieved may apply for the remedy.⁴ But the weight of authority is against the conclusion in this case, and to the effect that equity will not interfere but leave the matter to be determined upon action brought by the state to test the question of corporate existence.⁵ An injunction in the name of the state, on the relation of the prosecuting attorney, against the circuit judge, the clerk, and the sheriff was held the proper remedy by which to test the validity of an act establishing courts in certain counties.⁶

§ 614. **Acts detrimental to Public — Suit by Private Party.** — In the absence of a statute imposing the duty upon some officer or

¹ *Butler v. Ellerbe*, (S. C.) 22 S. E. 425; *State v. Lord*, (Or.) 43 P. 471; *State v. Penoyer*, (Or.) 37 P. 906; *Welton v. Dickson*, (Neb.) 57 N. W. 559; *Green v. Mills*, 69 F. 852; 16 C. C. A. 516; *Fesler v. Brayton*, (Ind. Sup.) 44 N. E. 37; *Larcom v. Olin*, 35 N. E. 113; 160 Mass. 102; *Stevens v. Training School*, 144 Ill. 336.

² *Pacific Express Co. v. Cornell* (Neb.), 81 N. W. 377.

³ *Woolsey v. Dodge*, 6 McLean, 142.

⁴ *Bradley v. Commissioners*, 2 Humph. (Tenn.) 428.

⁵ *Infra*, § 620.

⁶ *State v. Hughes*, 104 Mo. 459; 16 S. W. 489. See also *State v. Ellis*, 42 La. An. 1104; 8 So. 305.

official board, any tax-payer, on behalf of himself and others, has the right to institute proceedings in a court of equity to prevent the misapplication of public funds by municipal officers, on the ground that the threatened illegal corporate act will increase the burden of taxation, and thus burden the plaintiffs.¹ And complainants who are and are averred to be citizens, voters, property-holders, and tax-payers of a county, may obtain an injunction against a county officer to prevent his doing an unauthorized act detrimental to the interest of themselves and other citizens of the county.² They may enjoin a county judge from building a court-house at a place not the county seat, in default of any particular officer, whose duty it is to restrain him.³ So a tax-payer may maintain an action to enjoin a board of education of a city and county, authorized by statute to employ teachers, from drawing drafts on the school fund in favor of inspecting teachers, whose appointment is not authorized, without showing that he will sustain any special injury different from that of the public at large.⁴ And though the courts are reluctant to interfere until the necessity for doing so has arrived, and will usually refuse to enjoin a municipal body until the preliminary proceedings to making the unauthorized disbursement have been had, yet it was held a proper case for enjoining, at the suit of a tax-payer, town officers who, after a vote giving gratuities was rescinded, threatened to execute the first vote.⁵ But an injunction will not lie to restrain improper or unlawful conduct on the part of public officers at the suit of a resident of a county merely. It must be averred and shown that he is also a citizen and tax-payer, and that he will be greatly and irreparably injured by the act which he seeks to enjoin.⁶ Nor can an action for the purpose of having the act of a board of supervisors erecting a new town declared

¹ *Davenport v. Kleinschmidt*, 6 Mont. 502; 13 P. 249.

² *Rice v. Smith*, 9 Iowa, 570; *Sturmer v. County Court of Randolph Co.*, 26 S. E. 582; 42 W. Va. 724; 36 L. R. A. 300. See also *Dunbar v. Board of Com'rs of Canyon County*, (Idaho) 49 P. 409.

³ *Ibid.*

⁴ *Barry v. Goad*, 89 Cal. 215; 26 P. 785; *Youmans v. Board of Education*, 13 Ohio Cir. Ct. R. 207. See also *Alexander v. Johnson*, 144 Ind. 82.

⁵ *Terretts v. Sharon*, 34 Conn. 105.

⁶ *Caruthers v. Harnett*, 67 Tex. 127; 2 S. W. 523. See also *State, ex rel. Hawes v. Withrow*, 154 Mo. 397; 55 S. W. 400. But ordinarily mere laches do not bar actions to enjoin illegal disbursements of funds by public officers. *Storey v. Murphy*, 9 N. D. 115; 81 N. W. 23.

null and void, and enjoining its organization, be maintained by persons having no other interest than that enjoyed in common with all the freeholders of the new town, the only remedy in such case being at the instance of the state or some officer.¹

§ 615. **Same — Early Views to the contrary.** — The rule of the last preceding section that an individual tax-payer may sue may at present be said to be well established. But at one time a contrary doctrine was supported in one or two cases in New York. Thus, a statute giving a right of action to tax-payers against “the officers of any town, county, or municipal corporation to prevent waste or injury to any property, funds, or estate thereof,” was held not to give any unusual remedy, as an injunction, against boards having judicial authority, in which case the remedy would be by appeal.² But a recent statute has been passed giving to private citizens who are tax-payers the right to maintain such suits, and authorizing the prosecution of an action by a tax-payer against officers or commissioners of any municipal corporation “to prevent any illegal official act on their part, or to prevent any waste or injury” to the property or funds of the corporation.³ Likewise in Massachusetts it was considered necessary to enact a statute conferring the jurisdiction on courts of equity to entertain such actions at the suit of individual tax-payers, it being there held that in the absence of such statute the jurisdiction could not be entertained.⁴

§ 616. **Same — Where Injury must be shown.** — In the case of injunction to restrain the acts of municipal officers not injurious to the community at large but specially injurious to an individual, there must be a certainty of right to the relief asked, and it must appear that unless an injunction be granted irreparable mischief will ensue.⁵ One who is the owner of a state bond, whose present

¹ *Doolittle v. Supervisors of Broome County*, 18 N. Y. 155.

² *Osterhant v. Hyland*, 27 Hun (N. Y.), 167; N. Y. Laws 1872, ch. 161, as amended 1879, ch. 526.

³ *Armstrong v. Grant*, 9 N. Y. S. 388; 56 Hun, 226, holding that the execution of a proposed contract by a board of electrical control should be enjoined at a tax-payer's suit, as being illegal and wasteful. See also *Beebe v. Board Sup'rs Sullivan County*, (Sup.) 19 N. Y. S. 629.

⁴ *Hall v. Cushman*, 6 Met. (Mass.) 425.

⁵ *Atty.-Gen. v. Liverpool*, 1 Myl. & Cr. 171. See upon this point the following authorities: *State v. Callaway County*, 51 Mo. 395; *Fletcher v. Tuttle*, (Ill. Sup.) 37 N. E. 683; *Hamer v. Brown*, (S. C.) 18 S. E. 938; *State v. Thorson*, (S. D.) 68 N. W. 202; *State v. Pennoyer*, 26 Or. 203; *Hurlbut v.*

value and ultimate security are diminished by a wrongful investment by the legislature of the fund set apart for its payment, comes within this rule, and has such an interest as authorizes him to sustain an action for an injunction restraining the state treasurer from making such investment of the fund.¹ But an injunction should in no case be granted against lawful acts which are necessary and beneficial though they result in an additional burden upon tax-payers; and it was held that an injunction sought to restrain the justices of the county court from making repairs upon a court-house within their jurisdiction was properly refused.² A town may, however, in its own name restrain illegal acts by its officers without showing special injury.³

§ 617. **Exercise of Judicial and Discretionary Powers not enjoined — County Boards.** — Injunction will not be granted in any case to restrain an act which is being or about to be done in the legitimate exercise of judicial or official discretion. And a board of county commissioners is a court of inferior and limited jurisdiction, and though statutory powers conferred on such tribunal must be strictly pursued, in accordance with the course pointed out, yet when such a court has been intrusted with the exercise

Town of Lookout Mountain, (Tenn.) 49 S. W. 301. Compare *Fine v. Stuart*, (Tenn.) 48 S. W. 371; *Seager v. Kankakee County*, 102 Ill. 669; *Atty.-Gen. v. Brown*, 1 Swanst. 265; *Atty.-Gen. v. Great Northern R. Co.*, 4 De G. & S. 75; *Atty.-Gen. v. Forbes*, 2 Myl. & Cr. 123; *Atty.-Gen. v. Mid. Kent R. Co.*, L. R. 3 Ch. 100; *Atty.-Gen. v. Aspinwall*, 2 Myl. & Cr. 613; *Dangars v. Rivaz*, 28 Beav. 333; *Atty.-Gen. v. Corp. of Poole*, 4 Myl. & Cr. 17; *Re Beloved Wilkes' Charity*, 3 Mac. & G. 440; *Atty.-Gen. v. Corp. of Norwich*, 2 Myl. & Cr. 406; *Atty.-Gen. v. Corp. of Litchfield*, 13 Sim. 546; *Dean v. Bennett*, L. R. 6 Ch. 489; *Re Fremington School*, 11 Jur. 421; s. c. 10 Jur. 512; *Dummer v. Corp. of Chittenham*, 14 Ves. 245.

¹ *Graham v. Horton*, 6 Kan. 343. See also *Old Colony Trust Co. v. City of Atlanta*, 83 F. 39. But bondholders of a water company cannot enjoin a city treasurer from paying warrants issued to the company for hydrant rentals on the ground that the city had, by ordinance, agreed to pay such rentals to the bondholders, and had set apart a special fund for that purpose, when it is not alleged that the bondholders purchased in reliance on such agreement, or knew of the special fund, or that any demand had been made on the city and refused, or that the city is insolvent. Under such facts, the plaintiffs are general creditors only. *Courtney v. City of Cherryvale*, (Kan.) 51 P. 980.

² *Vitt v. Owens*, 42 Mo. 512.

³ See *Daunesburgh v. Jenkins*, 46 Barb. (N. Y.) 294, holding that a town may in its own name maintain a suit to restrain the negotiation of bonds issued in its name by a person under color of authority, when the town has never accepted the act authorizing it to issue such bonds, and consequently they are absolutely void.

of discretionary powers and the acts done are within the power conferred, and have been performed in good faith, then no court possesses the power to interfere or control such discretion. Accordingly where supervisors have jurisdiction to review the orders of commissioners of highways on appeal, equity will not interfere with their action when they proceed regularly in the exercise of such jurisdiction.¹ Nor have the courts any jurisdiction to enjoin the execution of an order of the postmaster general, made pursuant to the laws of the United States, finding that a certain corporation and its officers are engaged in conducting a lottery, and forbidding postmasters to deliver registered letters or pay money orders to them, since the making of such order involves an exercise of discretion reposed in the postmaster general.² Nor will a board of county commissioners be prevented by an injunction from changing the depository of the public moneys of a county, when in the discretion of the board it is deemed best that a change should be made,³ nor will they be restrained in anticipation of their paying alleged illegal claims, it not being alleged that there is an excess of jurisdiction on the part of the board.⁴ So an order of a county court establishing a ferry is a judicial act, which cannot be set aside except on appeal, and the exercise of the privilege conferred thereby cannot be prevented or restrained by an order of injunction issued by another court in an independent or distinct action or proceeding.⁵ But where the board of county commissioners attempted to issue the bonds of the county in a manner different from that prescribed by law, it was held that an injunction would be granted restraining the issue.⁶

§ 618. **Same — Other Bodies.** — The same rule applies to other official bodies; as where the granting of permits to replace old electrical wires with new ones of larger size and conductivity, such replacement being matter of construction, is left within the dis-

¹ *Gray v. Lott*, 18 Ill. 251. See also *McCormick v. Kinsey*, 10 Pa. Supr. Ct. 607.

² *Enterprise Sav. Ass'n v. Zumstein*, (C. C. A.) 67 F. 1000. To same effect, *Lane v. Anderson*, (C. C.) 67 F. 563.

³ *First Nat. Bank v. Stranathan* (*First Nat. Bank v. Board of Comm'rs*), 43 Kan. 648; 23 P. 1079.

⁴ *Merriam v. County of Yuba*, 72 Cal. 517; 14 P. 137.

⁵ *Stahl v. Brown*, 84 Ky. 825; 1 S. W. 540; *Wilkins v. City of New York*, (Com. Pl. N. Y.) 30 N. Y. S. 424. See also *Ex parte Lumsden*, 41 S. C. 553; *Hamer v. Brown*, 40 S. C. 336; *Wheeler v. Comm'rs*, 46 La. An. 731.

⁶ *English v. Smock*, 34 Ind. 115.

cretion of a board of electrical control by statute; and an injunction will not lie against the refusal to grant such permits.¹ Where the charter of a city conferred upon its council authority to pass upon and declare the results of a city election, the duties of the common council under this provision are judicial, and not ministerial; and an injunction will not lie to restrain them from inquiring into the validity of the election, and awarding their certificate of election to a person other than the one whose election has been certified by the inspectors of election in the first instance.²

§ 619. **Abuses of Discretion enjoined.** — But while equity will not invade the proper domain of discretionary powers, yet it will extend its extraordinary powers to restrain abuses of discretion so gross and palpable as to evince malice, and a total disregard of the duties and obligations pertaining to the official position, and an intention to resort to arbitrary exercise of power.³ Under such circumstances an injunction was issued against a superintendent of buildings in the city of New York.⁴ But a court of equity will not enjoin commissioners from constructing a ditch beside a public road, where the evidence does not clearly show that the proposed ditch will be an abuse of the discretion vested in the

¹ *United States Illuminating Co. v. Grant*, 55 Hun, 222; 7 N. Y. S. 788. See also *City of Detroit v. Hosmer*, 79 Mich. 384; 44 N. W. 622.

² *Halloran v. Carter*, 13 N. Y. S. 214; *People v. City of Kingston, Id.*; *In re Sloan*, (N. M.) 25 P. 980.

SCHOOL BOARD — RELIGIOUS SERVICES IN SCHOOL. — A bill filed by a tax-payer of a school-district set out that the board of education had rented the basement of a church under the control of a congregation of Roman Catholics, and was maintaining one of the public schools there; that only Romanist teachers were employed; that the children of Catholic parents, and the teachers, were "required" regularly to attend mass; to listen to instruction in the Catholic catechism in the school-room; that the *angelus* prayer was said by pupils and instructors, and that such basement had never been established as a school-site by a vote of the people of the district. *Held*, it appearing that the district had voted down a proposition to bond the district to erect a new school-house, that the board had power to rent the basement of the church for school purposes, and no grounds were presented for equitable relief, it not appearing *by whom* the religious exercises were "required." *Millard v. Board of Education*, 116 Ill. 23; 10 N. E. 669.

³ *Alexander v. Johnson*, (Ind. Sup.) 41 N. E. 811; *Mutual Life Ins. Co. v. Boyle*, 82 F. 705; *Dinsmore v. Southern Exp. Co.*, 92 F. 714.

⁴ *Tribune Assoc. v. The Sun*, 14 N. Y. Sup. Ct. 175. Compare *Dairies v. Cooke*, 91 U. S. (1 Otto) 580. The circuit court, sitting as a court of chancery, may restrain, by injunction, a special commissioner in chancery from executing a decree of sale. *People v. Gilmer*, 10 Ill. (5 Gilm.) 242.

commissioners ;¹ and although an injunction may issue to restrain public officers from making corrupt appointments, such an injunction will not be granted on uncertain and indefinite allegations.²

§ 620. **Not granted to try Title to Office.**— Though there is some conflict of authority as to how far equitable relief by injunction may be successfully invoked to protect one in the possession and exercise of a public office, it is well settled by a great preponderance of authority that injunction is not a proper remedy to try the title between rival claimants, as to which is entitled to fill and exercise the duties of an office, *quo warranto* and not injunction being the proper remedy.³ Nor will injunction be

¹ Following *Thornton v. Roll*, 118 Ill. 350; 8 N. E. 145; *Hotz v. Hoyt*, (Ill.) 25 N. E. 753.

² *Roosevelt v. Edson*, 51 N. Y. Super. Ct. 27.

³ *Jones v. Commissioners of Granville*, 77 N. C. 280; *Gilroy's Appeal*, 88 N. C. 77; *Brower v. Commissioners of Schuylkill County*, 21 Pa. Co. Ct. R. 811; 7 Pa. Dist. R. 701; *Cozart v. Fleming*, 31 S. E. 822; 123 N. C. 547; *Davis v. City Council of Dawson*, (Ga.) 17 S. E. 110; *Burgess v. Davis*, 138 Ill. 578; *Wilder v. Underwood*, 57 P. 965; 60 Kan. 859; *Payntz v. Shackelford*, (Ky.) 54 S. W. 855; *Fort v. Thompson*, 69 N. W. 110; 45 Neb. 772; *District Tp. of Grove v. Myles*, 109 Ia. 541; 80 N. W. 544; *State, ex rel. Hawes v. Withrow*, 154 Mo. 397; 55 S. W. 460. Payment of salaries not enjoined where title to office involved. *Burgess v. Davis*, (Ill. Sup.) 28 N. E. 817; *Campbell v. Taggart*, 10 Phila. (Pa.) 443; *Sneed v. Bullock*, 77 N. C. 282; *Neeland v. State*, 39 Kan. 154; 18 P. 165; *Markle v. Wright*, 13 Ind. 548; *State v. City of Kearney*, (Neb.) 44 N. W. 90; *Goldman v. Gillespie*, (La.) 8 So. 880; *State v. Judge of Ninth Judicial District Court*, Id. 883; *Cochran v. McCleary*, 22 Iowa, 75; *Hasner v. Heyberger*, 7 Watts & S. (Pa.) 104; *Updegraff v. Crans*, 47 Pa. St. 103. See also *People v. Draper*, 24 Barb. 265; s. c. 4 Ab. Pr. 322; 14 How. Pr. 233; *Moulton v. Reid*, 54 Ala. 320; *Beebe v. Robinson*, 52 Ala. 66; *Tappan v. Gray*, 9 Paige, 507, affirmed 7 Hill, 259; *Planters' Company Association v. Haues*, 52 Miss. 469; *Sheridan v. Colvin*, 78 Ill. 237; *Jones v. Commissioners of Granville*, 77 N. C. 280; *Dickey v. Reed*, 78 Ill. 261; *McAllen v. Rhodes*, 65 Tex. 348; *Gilroy's Appeal*, 100 Pa. St. 5; *Kilpatrick v. Smith*, 77 Va. 347; *Neeland v. State*, 43 Ark. 62; *Ex parte Wimberly*, 57 Miss. 437. But see *Keer v. Trego*, 47 Pa. St. 292, holding that either of the two conflicting bodies of men, claiming to hold one and the same office, at one and the same time, may apply to the supreme court for an injunction to restrain the other from usurpation of powers to which it is not entitled. And in *Appeal of Town Council*, (Pa.) 15 A. 730, it was held that one who has been duly elected, and has qualified as collector of taxes under act Pa., June 25, 1885, making the collectorship an elective office, need not resort to a writ of *quo warranto* to determine the title of one subsequently appointed by the town council, but equity will enjoin the authorities from delivering the tax duplicates to the appointee. The provision in the North Carolina Code, that a temporary injunction may be granted when, pending a litigation, it appears that the defendant

granted to determine the title to office, where another method for determining it than the action *quo warranto* has been provided by statute.¹ An examination of the authorities discloses that considerations of public interest and convenience have much to do with the strict adherence to this rule.² Nor has a court of equity jurisdiction to enjoin the issuance of a certificate of election to, and the assumption of office by, a newly elected city marshal, on petition of the present marshal alleging disqualification of the newly elected officer under the city charter.³ And where one who had been, and still claimed to be, the state comptroller brought an information, and prayed for an injunction against a rival claimant, and the state treasurer, on the ground that by means of that claim, and of the acts and threats of the treasurer in support of it, the fiscal interests of the state were placed in imminent hazard, the court refused to grant the injunction upon a positive denial of these allegations.⁴ Nor should an injunction be granted to restrain the *de facto* mayor and aldermen of a city from exercising their offices, unless, perhaps, on proof that they are intruders who are abusing their possession of official power, and that the public will sustain damage by the suspension of city government.⁵

is doing some act which is in violation of the plaintiff's rights, and tending to render a judgment in his favor ineffectual, does not apply to cases of usurpation of a public office, but is confined to suits where the subject of controversy is a private right. *Patterson v. Hubbs*, 65 N. C. 119. An election having been improperly held for the filling of a vacancy in the office of a common pleas judge, the court refused to issue an injunction, by which it was sought to restrain the governor from commissioning the party claiming to be elected, and the latter from accepting the office. *Beal v. Ray*, 17 Ind. 554.

¹ *Tupper v. Dart*, (Ga.) 30 S. E. 624. See also *Goldsworthy v. Doyle*, (Pa. Sup.) 34 A. 630; 175 Pa. St. 246.

² *People v. Draper*, 24 Barb. 265; 14 How. Pr. 233. In this case the court say: "The public welfare has been deemed to require that an actual incumbent of an office should not be forbidden to perform the duties of it for the time being, even though his title to the office were doubtful; that the public should not be deprived of the benefit of an office merely because it was uncertain whether the person in and ready to perform the duties of it were rightfully in possession, even while the title of the party assuming to act should be in controversy. To restrain the action of the incumbent is to restrain all the functions of the office; for he being in, even if wrongfully, no one else can enter until he is removed, and he must act, or no one can. And it is not at all difficult to see that in very many and most cases the public interest would require that the duties of an office should not be suspended, and its functions cease, until the matter of personal right between rival claimants could be determined."

³ *Neiser v. Thomas*, 99 Mo. 224; 12 S. W. 725.

⁴ *State v. Jarrett*, 17 Md. 309.

⁵ *State v. Wolfenden*, 74 N. C. 103.

§ 621. **Incumbent protected from Intrusion and Interference.** — But the right to assume and exercise the functions and duties pertaining to an office, and the claim of a right to interfere with another, clothed with the legal color of authority and in possession, to discharge the duties and enjoy the emoluments, are separate and distinct matters ; and injunction to prevent interference with the possession of a *de facto* officer lies at the instance of a member of a board, where it appears that the adverse claimant may, otherwise than by concurrent action with the members of the board, induct himself extra-judicially, in part, into office, and to some extent oust the incumbent.¹ It lies, also, where it is a possibility that the members of the board, though they may actually repudiate the validity of the appointment under which the claimant shelters himself, may recognize his pretensions and admit him as a member.² And one who holds a position under the protection of the civil service laws and rules is entitled to the remedy by injunction to prevent his unauthorized removal therefrom.³ But an injunction will not issue to restrain a party from taking possession of an office and its books and papers under color of legal title thereto.⁴ Nor will a court of equity interfere by injunction, at the instance of a person who claims an office under an election by the people, to restrain the payment of the salary to the incumbent, pending the trial of a contest as to the right to the office, unless the bill shows that an action at law for the salary or fees received by the incumbent would be abortive.⁵

§ 622. **Same — Pending Contest.** — Sometimes an injunction is necessary and proper to preserve the rights of the incumbent of an office pending an action at law to test the title. Thus, where, after a party claiming an election as sheriff was commissioned by

¹ *Goldman v. Gillespie*, (La.) 8 So. 880 ; *State v. Judge of Ninth Judicial District Court*, Id. 883. See also *School Dist. No. 47 of Waseca County v. Weise*, (Minn.) 79 N. W. 668 ; *Parsons v. Durand*, (Ind.) 49 N. E. 1047 ; *Wheeler v. Board of Fire Com'rs, of New Orleans*, (La.) 15 So. 179 ; *Commissioners of Washington County v. Com'rs*, 77 Md. 283 ; *Luce v. Fensler*, 85 Iowa, 596 ; *Armitage v. Fisher*, (Sup.) 24 N. Y. S. 650 ; 4 Misc. Rep. 315 ; *McCue v. Holleran*, 7 Del. Co. B. 458 ; 9 Kulp, 433 ; *Franklin v. Appel*, 10 S. D. 391.

² *Ibid.*

³ *Priddle v. Thompson*, 82 F. 186 ; *Butler v. White*, 88 F. 578 ; *Couper v. Smyth*, 84 F. 757.

⁴ *Coulter v. Murray*, 15 Abb. (N. Y.) Pr. n. s. 129.

⁵ *Colton v. Price*, 50 Ala. 424 ; *Lawrence v. Leidigh*, 50 P. 889 ; 58 Kan. 676.

the governor, a suit was brought to test the validity of the election, which was decided in favor of the contestant, and thereupon, pending a *certiorari*, the governor issued another commission to the latter, it was held that an injunction would issue to restrain the party last commissioned from interfering with the office.¹ So where one person in possession and exercise of an office was ousted by another acting under a commission from the governor, whereupon the former incumbent brought an action of *quo warranto*, on the ground of the illegality of the commission, it was held that, pending such action, the supreme court, in view of the defendant's insolvency, might grant an injunction to prevent him from receiving the fees and emoluments of the office until the decision.² But during the pendency of a suit to test the right to a state office, an injunction will not be granted to restrain the incumbent from discharging his duties, when the petitioner does not show that an injury would result to him if his application be denied.³

§ 623. **Executive State Officers.**—It would be difficult to lay down an unqualified rule defining the powers of courts of equity to restrain by injunction the acts and conduct of executive officers of the state and the heads of departments in the national government. The partition of government into legislative, judicial, and executive branches implies, and constitutions usually expressly provide for, the independence of each, and prohibit encroachments upon the proper province of each by either of the others; and yet an examination of the decisions discloses that state officers, even governors, have been virtually subjected to the rule which applies in the case of county and town officers, that is, they will not be interfered with in the exercise of duties which require the exercise of discretion, but will be enjoined from the doing of acts which are purely ministerial in character when not authorized by law.⁴

¹ *Ewing v. Thompson*, 43 Pa. St. 372.

² *Tappan v. Gray*, 3 Edw. (N. Y.) 450.

³ *Terry v. Stauffer*, 17 La. An. 306; *People v. Draper*, 24 Barb. 265.

INJUNCTION AND RECEIVER.—A court of chancery has no injunction to enjoin A., a flour inspector, who entered upon the discharge of his duties under color of an appointment by the governor, made during a recess of the senate, or to appoint a receiver of the fees and emoluments until the rights of the former inspector, who claimed to hold over, and of A., could be determined at law, although A. is insolvent. *Tappan v. Gray*, 7 Hill, (N. Y.) 259.

⁴ *Litchfield v. Richards*, 9 Wall. 575. See *Schofield v. Perkerson*, 46 Ga. 350; *Gaines v. Thompson*, 7 Wall. 347; *Western Star Lodge v. Schminke*,

For though it has often been remarked that courts will not interfere with the executive functions of state officers, the same is true in the case of inferior officers acting within the law in good faith. But it should be borne in mind, on the one hand, that an act done in clear violation of law should in no case be considered as falling within the definition of a discretionary executive duty, and on the other, that the range of discretion of state officers is much wider than in the case of inferior officers concerning whose duties statutes go more into detail.

§ 624. **Same Subject — Relief granted.** — As illustrating the exercise of jurisdiction by courts in restraining unlawful acts inflicting irreparable injury to individuals, a New York state comptroller was enjoined from selling a railroad to the prejudice of those holding its bonds, under an act of the legislature;¹ and a commissioner of a state land office was restrained from advertising and selling public lands until complainant should have had an opportunity to make a selection out of the lands about to be sold, which he was entitled to make under a statute.² And in a case before the United States supreme court it was said, that although a person cannot maintain a suit against a state, without the state's consent, nor a court substitute its discretion for that of executive officers, in matters belonging to their jurisdiction, yet, as when a plain official duty requiring no exercise of discretion is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a writ of mandamus to compel performance; so when such a duty is threatened to be violated by some positive official act, any person who will thereby sustain personal injury, for which adequate compensation cannot be had at law, may have an injunction to prevent it, these writs in such cases being in a degree correlative.³

4 McCrary, 366; Davis v. Gray, 16 Wall. 203; Cunningham v. Macon & Brunswick R. Co., 109 U. S. 453; Osborn v. U. S. Bank, 9 Wheat. 758. As to power of supreme court to enjoin secretary of state under reapportionment act alleged to be unconstitutional, see Giddings v. Blacker, (Mich.) 52 N. W. 944. No power to enjoin executive of state from proceeding under unconstitutional statute. Frost v. Thomas, (Colo.) 56 P. 899. See also *In re Contempt Proceedings v. Grear*, 6 Ohio N. P. 312; *Coleman v. Glenn*, (Ga.) 30 S. E. 297.

¹ Darby v. Wright, 3 Blatchf. 170.

² Webster v. Newell, 66 Mich. 503; 33 N. W. 535.

³ Liquidation Board v. McComb, 92 U. S. 531. To the same effect, Crawford v. Carson, 35 Ark. 565.

§ 625. **Same — Relief refused.** — The delivery of a certificate of election to one claiming to have been elected a member of Congress is an act calling for the exercise of judicial discretion on the part of the governor of a state and cannot be controlled by injunction.¹ And if the President of the United States is in any case subject to the civil jurisdiction of the courts in matters pertaining to his official duties, it is plain that he cannot be enjoined from executing an act of Congress claimed to be unconstitutional until such act has been passed upon by the courts, since the duty of judging of the validity of laws with reference to their constitutionality is imposed upon him by the constitution, and necessarily calls for the exercise of judicial discretion in its performance; and it is immaterial in such case whether the President be described by his official title or be proceeded against as a citizen of a state.² So a cancellation of a land entry in the land office cannot be enjoined, it being considered the exercise of a discretionary rather than a ministerial duty.³ But there are several cases in which the power of interference by the courts with acts by executive officers was denied irrespective of the character of such acts whether ministerial or discretionary, legal or illegal, there being considered to be a lack of jurisdiction over the subject-matter.⁴

§ 626. **Existence of Legal Remedies.** — Since the principal reason for interference with acts of public officers is the absence or inadequacy of legal remedies, it is an insuperable obstacle to granting an injunction that the party may obtain relief suited to the exigencies of his case by action, motion, or other proceeding at law. As has been previously shown, the remedy by *quo warranto* and not injunction is the proper one in all cases involving

¹ *Bates v. Taylor*, 3 Pick. (Tenn.) 319; 11 S. W. 266.

² *Mississippi v. Johnson*, 4 Wall. 475.

³ *Gaines v. Thompson*, 7 Wall. 347; *Marbury v. Madison*, 1 Cranch, 137. In *Walsh v. Preston*, 109 U. S. 297, it was held, in a suit against the commissioner of a state land-office, by one claiming land under a colonization contract made with the state many years before, the state not being a party to the suit, that a decree enjoining the commissioner from issuing to others than the plaintiff certificates for land within the boundaries of the plaintiff's claim, but not affirming the plaintiff's right to any specific land, nor to any certain quantity, nor assuming to adjust the conflicting rights of the state and the plaintiff, was erroneous, especially as, on the merits, the plaintiff's claims were not sustained by the proofs.

⁴ *Smith v. Myers*, 109 Ind. 1; 9 N. E. 692. See also *Cicombe v. Kittelson*, 29 Minn. 555; *Marye v. Parsons*, 114 U. S. 825; *Western R. R. Co. v. De Graff*, 27 Minn. 1.

title to an office.¹ Nor should an injunction be granted to compel justices of an inferior court to enforce a contract;² or to compel a board to "furnish just and adequate facilities" to a party.³ In both cases mandamus is the proper remedy. Nor has a court of equity jurisdiction to entertain a bill to enjoin the mayor and aldermen of a city from removing a person from his office, and appointing a successor, and from preventing the person from discharging his duties after removal by them, as his remedy at law is complete, by *quo warranto* against the successor, or mandamus against the mayor and councilmen. Where the person is improperly removed, he may by mandamus compel the mayor and aldermen to restore to him any evidence of his right to the office, or to any property pertaining thereto, which they improperly withhold;⁴ and he has a complete remedy at law for any fees and emoluments pertaining to the office of which he is deprived.⁵ And the right of action on official bonds is frequently a bar to relief by injunction. But injunction will lie to restrain a public officer from entering into a contract with himself individually to furnish supplies to a public institution, as a suit on his bond would not be an adequate remedy.⁶ And an injunction which directs the county judge not to remove the county offices and records, is not in conflict with a mandamus which directs him and other members of the canvassing board to canvass the election returns on the question of such removal, and to declare the result.⁷

¹ *Supra*, § 620. See also *MacDonald v. Rehner*, 22 Fla. 198; *Delahanty v. Warner*, 75 Ill. 185.

² *The Justices v. Croft*, 18 Ga. 473.

³ *United States Illuminating Co. v. Hess*, 3 N. Y. S. 777.

⁴ Cases where relief by *mandamus* a bar to injunction. *Barber v. West Jersey Title & Guaranty Co.*, (N. J. Err. & App.) 32 A. 222; *Nassau Electric R. Co. v. White*, (City Ct. Brook.) 84 N. Y. S. 960; 12 Misc. Rep. 631. See also *Enterprise Sav. Ass'n v. Yumstein*, 15 C. C. A. 153; *Mendenhall v. Denham*, 35 Fla. 250; *Mutual Electric Light Co. v. Ashworth*, 50 P. 10; 118 Cal. 1; *Reeves v. Griffin*, (Com. Pl.) 4 O. L. D. 461.

⁵ *Delahanty v. Warner*, 75 Ill. 185; *Keating v. Fitch*, (Sup.) 35 N. Y. S. 641. See also *Wahl v. School Directors*, 78 Ill. App. 403.

⁶ *Alexander v. Johnson*, (Ind. Sup.) 41 N. E. 811. See also *Deweese v. Hutton*, (Ind. Sup.) 43 N. E. 13, where it was held that in an action by taxpayers to enjoin a contract by county commissioners providing for an unauthorized expenditure of public money, a bond given by the contractor for faithful performance of the contract is not, as supplying an adequate remedy at law, available as a defence.

⁷ *Dishon v. Smith*, 10 Iowa, 212.

An injunction should not issue for the purpose of restraining a judicial officer from transcending his jurisdiction; a writ of prohibition is the proper remedy.¹ And on a bill seeking to restrain the organization of a new school district upon the ground that the joint board of selectmen and the school committee had been unduly influenced by the offer of certain petitioners therefor to furnish a school-house, etc., the injunction was refused. The remedy for the error, if any, must be found by *certiorari* or some other proceeding on the law side of the court.²

§ 627. **Same — Various Remedies.** — Injunction does not lie to restrain town officers from arresting and fining complainant for a violation of an unlawful town ordinance. He has sufficient remedy by action for damages.³ But usually equity has jurisdiction to enjoin the officers of a city against the enforcement of an invalid ordinance, notwithstanding the individual citizens may have the right to appeal to the common pleas from the action of councils in passing ordinances.⁴

Where an officer, who levies an execution on property wrongfully, is abundantly able to meet the liability incurred by taking the goods, the aggrieved party has a remedy at law, and cannot have relief in equity.⁵ Nor can a distraint by a treasurer, against the money and property of an incorporated bank, be enjoined in chancery. If the act imposing the tax is unconstitutional, the treasurer is a trespasser, and is liable at law.⁶ For the same reason, and because the insolvency of the defendant was not shown, nor other facts showing that complete relief could not be obtained at law, where the defendants threatened to take possession of a part of the lands of the plaintiff, remove his fences, throw open a great portion of his lands to the public, and deprive him of the use thereof, for the purpose of opening a highway through the

¹ Ward v. Kelsey, 14 Abb. (N. Y.) Pr. 106.

² Lain v. Murrill, 51 N. H. 422. See also Tucker v. Freeholders of Burlington, 1 N. J. Eq. (Sax.) 282; Manly Manuf'g Co. v. Broaddus, (Va.) 27 S. E. 438; Alexander v. Johnson, 144 Ind. 82; Deweese v. Hutton, Id. 114; Louisville & N. R. Co. v. McVean, (Ky.) 34 S. W. 525; Board of Com'rs of Wayne County v. Dickinson, (Ind.) 53 N. E. 929; Moores v. Smedley, 6 Johns. Ch. 28, reversing s. c. 8 Paige, 198; Van Doren v. Mayor, 9 Paige, 388; Bouton v. Brooklyn, 15 Barb. 375; Hyatt v. Bates, 40 N. Y. 164.

³ Cohen v. Goldsboro, 77 N. C. 2.

⁴ Appeal of Harper, 109 Pa. 9; 1 A. 791.

⁵ Chapell v. Cox, 18 Md. 513.

⁶ Mechanics' Bank v. Debolt, 1 Ohio St. 591.

same, under an order of the board of county commissioners, alleged to be void, an injunction was refused.¹ And a court of equity will refuse to interfere by injunction to prevent a party from applying to the commissioners of highways for a private road over the complainant's land, as the complainant has a complete remedy at law.²

§ 628. **Exercise of Police Powers not interfered with.** — No court has jurisdiction to interfere with the public duties of any of the departments of the government, or to override the policy of the state; and a court of equity is without power to enjoin the exercise of the police powers given by law to the officers of a municipal corporation, so as to prevent such officers from preserving the public peace, such for instance as keeping a public street open to public use.³ Nor will an injunction issue to restrain an interference by the police authorities with the business of a liquor dealer by arresting him and his employees. If the arrests are illegal, *habeas corpus* and suits for damages afford him ample remedy.⁴ And an injunction was refused where sought to restrain the police authorities within a metropolitan police district from placing policemen in front of a public house in which guests had been repeatedly subjected to unjust, exorbitant, and illegal charges, and from giving warning to strangers about to enter to be careful.⁵ Nor does it alter the case that police supervision

¹ *Lewis v. Rough*, 26 Ind. 398. Where, after petition to county commissioners to vacate a public road, without notice having been given as required by Kan. Corp. L. 1879, c. 8, injunction was brought against them before they had taken any action to restrain them from vacating, it was held that the injunction was prematurely brought. *Troy v. Donephan Co. Comm'rs*, 32 Kan. 507. In *Heston v. Longstreth*, 1 Phila. (Pa.) 25, it was held that an injunction restraining the authorities of a state from taking private property for public use, on the ground that the compensation to be allowed is inadequate, could not be maintained, for the reason that the legislature is the proper authority to grant relief in such cases.

² *Winkler v. Winkler*, 40 Ill. 179.

³ *City of Chicago v. Wright*, 69 Ill. 318.

⁴ *Ficke v. New York Police Comm'rs*, 66 How. (N. Y.) Pr. 318. Equity will not restrain a court-martial from trying a person who is subject to its jurisdiction, where the only ground relied upon for an injunction is that he has already been tried upon the same charge, and fears that the second trial will be unfairly conducted. *Perault v. Rand*, 17 N. Y. Supreme Ct. 222.

⁵ *Prendorill v. Kennedy*, 34 How. (N. Y.) Pr. 416. See also *Weiss v. Herlihy*, 49 N. Y. S. 81; 23 App. Div. 608; *Caille v. Haager*, (Ky.) 50 S. W. 244; *Yellowstone Kit v. Wood*, (Tex. Civ. App.) 43 S. W. 1068; *Ewing v. City of Webster*, (Iowa) 72 N. W. 511; 103 Iowa, 226.

is exercised in an arbitrary and unlawful manner. The remedy is by action for damages, or by a criminal prosecution.¹ But the fixing of rates and enforcement thereof by a state board of railroad commissioners is not the exercise of police power, and may be enjoined in a proper case.²

§ 629. **Not granted when ineffectual.** — A court of equity will not grant an injunction against officers when to do so would be without any beneficial results. Thus the writ was refused where sought to restrain the officers of a city from issuing, selling, and delivering its bonds in aid of local improvements, there being an express finding by the trial court that said bonds had been issued, sold, and delivered, before service of a temporary restraining order issued at the commencement of the action.³

§ 630. **Acts pertaining to Elections rarely enjoined.** — Acts of public officers pertaining to the calling, conducting, and certifying the results of elections, being the exercise of political functions of great importance, are rarely and reluctantly interfered with by courts of equity.⁴ Owing to the imperative necessity of protecting expressions of the popular will in the selection of officers and in other matters, and of having the results of such expressions accurately ascertained, numerous safeguards against fraud and abuse, and remedies for the correction of error and violations of duty, are usually provided by statute, so that the existence of a means of redress by statutory proceeding usually affords ample ground for refusing equitable remedies. Accordingly, where an election is called in pursuance of a law authorizing it, a court of equity has no power to restrain the officers

¹ *Sterman v. Kennedy*, 15 Abb. (N. Y.) Pr. 201.

² *Southern Pac. Co. v. Board of Railroad Com'rs of California*, (C. C.) 78 F. 238.

³ *City of Alma v. Loehr*, 42 Kan. 368; 22 P. 424; *Gray v. Jones*, 52 N. E. 941; 178 Ill. 169. Partly for the reason that the writ would be futile, the removal of subordinates by public officers will not be interfered with. *Heffran v. Hutchins*, 43 N. E. 709; 160 Ill. 550; *Page v. Moffett*, 85 F. 38; *Morgan v. Nuun*, 84 F. 551.

⁴ See *Harris v. Schryock*, 82 Ill. 119; *Clayton v. Calhoun*, 76 Ga. 270; *McLachlan v. Incorporated Town of Gray*, (Iowa) 74 N. W. 773; *Mendenhall v. Denham*, (Fla.) 17 So. 561; *Ex parte Lumsden*, (S. C.) 19 S. E. 749; *In re Contempt Proceedings v. Grear*, 6 Ohio N. P. 312. Compare *Cozart v. Fleming*, 31 S. E. 822; 123 N. C. 547. That no injunction to restrain the holding of an election will issue when the date fixed for the election has passed before the determination of the suit to restrain, see *McKinney v. County Comm'rs*, (Fla.) 3 So. 887.

from holding, or the people from voting at such election; and they cannot be punished for disobeying an injunction issued in such a case, as the court has no jurisdiction to issue the writ.¹ Nor should an injunction issue, at the instance of the tax-payers of a municipal corporation, to prevent the officers of the corporation from holding an election, under the authority of a legislative act, to enable the citizens of the corporation to vote to levy a certain tax on themselves. The action is premature. No right of the plaintiffs is as yet invaded, and the danger they seek to shun is too remote and contingent to warrant the issuance of an injunction.² And a court of equity is without power to restrain county commissioners from ordering an election for the removal of a county-seat, where the statute providing a mode for contesting elections furnishes a remedy;³ nor can they be enjoined from certifying to the governor the result of their canvass of the vote in their county for a representative in the Congress of the United States, which the law makes it their duty to do;⁴ nor do the facts that the complainant had taken exceptions to the canvass with the intention to take a writ of *certiorari* to the commissioners' proceedings, and that without the injunction the certificate would be made and the *certiorari* rendered abortive, warrant an injunction.⁵ Partly for the reason that full power to settle contests for seats in legislative bodies is vested in such bodies themselves, and partly because the duty is executive and discretionary, a court of equity has no jurisdiction to enjoin the secretary of state from delivering to the speaker of a legislative assembly the sealed returns of an election for governor, properly transmitted to him; and such injunction, if granted, will be treated as a nul-

¹ Walton v. Devling, 61 Ill. 201.

² Roudanez v. Mayor of New Orleans, 29 La. An. 271.

³ Weber v. Timlin, 37 Minn. 274; 34 N. W. 29.

ELECTION ON PROPOSITION TO ISSUE COUNTY BONDS. — Corp. Laws Kan. 1879, c. 36, art. 7, provides that any elector aggrieved by the result of an election may, whenever the board of canvassers shall declare any question or proposition voted on adopted, commence an action to enjoin and restrain the proper officers from executing, issuing, or delivering bonds, etc., in accordance with the alleged determination of the question voted on. *Held*, that, under this act, a person who had no greater interest than that of a resident elector, and tax-payer, could not maintain an injunction to restrain the proper officers from canvassing the votes cast. *State v. County of Wabaunsee*, 36 Kan. 180; 12 P. 942.

⁴ Alderson v. Commissioners, 32 W. Va. 640; 9 S. E. 868.

⁵ *Ibid*.

lity.¹ But the duty of a secretary of state to give notices of the election of members of the senate and assembly under an apportionment act is not political, but is purely ministerial, and, if the act is unconstitutional, he may be restrained by injunction from proceeding under it.²

§ 631. **Same — No Interference by Federal Court with State Election Officers.** — A bill of injunction will not lie in the United States circuit court to enjoin defendants, who are registering officers and poll-holders of election in a city of a state, from registering voters or holding an election in pursuance of state legislation and a municipal charter.³

§ 632. **Illegal Sale and Transfer of Property.** — A bill in equity may be brought in the name of the tax-payers of a county to enjoin the county commissioners from the execution and delivery of a deed to land belonging to the county, where there is involved an unjust burden upon the tax-payers, or a squandering of the resources of the county, to replace which taxation must be resorted to.⁴ But an injunction will not be granted to one making a junior entry on land to restrain one making a senior entry from receiving, and the secretary of state from issuing, a grant, where the application is based solely upon alleged fatal irregularities in the senior entry.⁵ A court of equity has jurisdiction, however, to enjoin a sheriff from making a sale of personal property for the payment of taxes on which he has levied where the bill alleges that said taxes have been paid off and discharged; and the injunction will be perpetuated.⁶ And the county treasurer may be restrained from selling unseated land for taxes where the owners have paid the taxes to the supervisors, and they have been returned to the commissioners.⁷ So where a commissioner of streets was proceeding wrongfully to sell the land of an abutter on a street, to pay taxes for grading the street, which were not legally laid, relief was granted in equity, and an

¹ *Fleming v. Guthrie*, 32 W. Va. 1; 9 S. E. 23. See also *Smith v. Myers*, 109 Ind. 1; 9 N. E. 692.

² *State v. Cunningham*, (Wis.) 51 N. W. 724.

³ *Holmes v. Oldham*, 1 Hughes, 76.

⁴ *McCord v. Pike*, 121 Ill. 288; 12 N. E. 259. Compare *Furey v. Town of Gravesend*, 104 N. Y. 405; 10 N. E. 698.

⁵ *Brem v. Houck*, 101 N. C. 627; 8 S. E. 865.

⁶ *Lewis v. Spencer*, 7 W. Va. 689.

⁷ *Commonwealth v. Colley Township*, 29 Pa. St. 121.

injunction on the sale was issued.¹ But an injunction will not be granted in favor of a township collector to restrain sale of land for taxes by township committee-men. There is ample remedy at law.²

§ 633. **Illegally paying out Money.** — Where treasurers have in their possession moneys belonging to a county, which, unless restrained, they will pay to the holders of bonds of such county issued without warrant of law, and void in the hands of the holders, equity will interfere at the suit of the county to restrain such payment.³ And a town treasurer will be enjoined from paying out money raised by the town for any illegal purpose.⁴ So where directors of a school district are about to make an unlawful and unauthorized disposition of the public-school fund, injunction is the only proper remedy of an individual tax-payer irrespective of the solvency of such directors.⁵ But where there was no claim that railroad aid bonds were issued fraudulently or collusively, the court refused to enjoin the town supervisor from paying the interest thereon out of money collected for that purpose in the usual course of taxation, before the validity of the bonds was questioned. Such payment is neither an "illegal act" nor does it constitute "waste" within the meaning of a statute which authorizes the prosecution of actions by the taxpayers of a town "to prevent any illegal act" of its officers, or "to prevent waste or injury" to its property or funds.⁶ But while a court will enjoin a public officer from executing a law which is unconstitutional, on the ground that such a law is no law and cannot authorize action by any one, yet it will not restrain him from doing that which a valid law requires. Where, therefore, special tax funds were by an act of the general assembly used by the treasurer to pay the general expense of the state government,

¹ *Baltimore v. Porter*, 18 Md. 284. Compare *Moore v. McNutt*, (W. Va.) 24 S. E. 682.

² *Brown v. Abbott*, (N. J.) 2 A. 24.

³ *Missouri, etc. R. R. Co. v. Commissioners*, 12 Kan. 230. See also *Webster v. Douglas County*, (Wis.) 77 N. W. 885.

⁴ *Fiske v. Hazard*, 7 R. I. 438.

⁵ *Black v. Ross*, 37 Mo. App. 250. Compare *Kilbourne v. Allyn*, 7 Lans. (N. Y.) 352, holding that an injunction will not issue to restrain the disbursement of the plaintiff's portion of a tax, to meet interest on town railroad bonds issued without authority, where the commissioners holding the fund are abundantly able to answer for its loss.

⁶ *Calhoun v. Delhi & M. R. Co.*, 121 N. Y. 65; 24 N. E. 27.

in violation of the constitution which prohibited such use, an injunction should not issue to restrain such treasurer from the payment of moneys out of the treasury of the state, until he has replaced the amount borrowed by him from the special tax fund, in accordance with the provisions of such act.¹ Relief by injunction against public officers will be refused where the amount involved is trivial in amount though the threatened act be unwholly authorized.²

§ 634. **Removal of County Seat.** — With a view to preventing irreparable injury to citizens and tax-payers, an injunction will be granted to restrain the removal of the county records and offices to a new seat, on a petition alleging fraud and irregularities sufficient to invalidate the legality of the proceedings, notwithstanding a statute provides a remedy by a new vote.³

§ 635. **Taking and injuring Property under Color of Office.** — Courts rarely interfere with the acts of officers done in connection with condemnation of private property for public use unless so clearly in excess of any legal authority as to constitute them

¹ *Self v. Jenkins*, 71 N. C. 578. See also *Birmingham v. Cheetham*, 54 P. 37; 19 Wash. 657; *Business Men's League v. Waddill*, 143 Mo. 495; 45 S. W. 262.

FEES OF OFFICE. — In an action by a deputy clerk against his principal to recover his share of fees, an injunction may be granted pending the cause, restraining the clerk from collecting or transferring such fees yet unpaid, and the sheriff from paying such fees collected by him to the clerk; and a receiver may be appointed. *Cheek v. Tilley*, 31 Ind. 121.

² *Brasher v. Miller*, (Ala.) 21 So. 467.

³ *Sweatt v. Faville*, 23 Iowa, 321; *Stuart v. Blair*, 8 Baxter, (Tenn.) 141. See also *Krieschel v. Board of Com'rs of Snohomish County*, (Wash.) 41 P. 186; 12 Wash. 428; *Streissguth v. Geib*, (Minn.) 69 N. W. 1097; Code, §§ 281-287, regulating elections for the relocation of county seats by petition to the county board, provide that the petition must be signed by "legal voters" of the county. Remonstrances signed by "legal voters" may also be filed, and if more than "half of all the legal voters in the county" sign the petition, and do not afterwards sign the remonstrance, an election shall be ordered, and if the place designated in the petition receives a majority of votes cast, the board shall declare the same the county seat, and shall remove the records thereto. *Held*, that the legislature having vested in the board full power to determine the sufficiency of the petition, and to authorize the submission of the question of relocation to a vote, its jurisdiction is exclusive, and an injunction will not lie to restrict the board in the exercise of its powers, even though the petition is an attempt to perpetrate a fraud on the board, it containing thousands of names of persons who are not "legal voters," and such board has no power to investigate the alleged fraud, being bound by the facts as they appear on the face of the proceedings. *Luce v. Fensler*, (Iowa) 52 N. W. 517.

trespassers. Even then the injured party will be left to his legal remedies unless irreparable damage be imminent.¹ And an injunction against county commissioners, who have failed to comply with certain requirements of law, to restrain their opening a road, cannot be final and perpetual, but only until they comply with such requirements.² Injunction lies to prevent overseers of roads from interfering to prevent a landowner from closing a highway unlawfully asserted over his lands.³ But a court of equity will not restrain trustees of a town engaged in laying out a highway, from making an excavation within a certain distance of adjoining land. Such trustees will be left free to act on their own responsibility without any other restriction than their sense of duty and the laws of the land.⁴ And it was held that whether or not the erection by harbor commissioners of a wharf in a street of a city in front of plaintiff's property, on which a wharf built at a great expense had been used for years, would constitute a taking or damaging of private property for public use within the meaning of the state constitution, an in-

¹ *Prospect Park & Coney Island R. R. Co. v. Williamsqn*, 24 Hun, (N. Y.) 216.

² *Champion v. Sessions*, 2 Nev. 271. Right to enjoin highway or town officers from injuring or taking private lands for a road, — affirmed. *Willett v. Woodhams*, 1 Ill. App. 411; *Poirier v. Fetter*, 20 Kan. 47.

³ *Oliphant v. Atchison County*, 18 Kan. 386. When land has been duly condemned as a public highway, and the amount the owner shall receive as compensation has been duly ascertained, and a warrant for the sum rendered him, which he has refused, a court of equity will not enjoin the road overseer from tearing down the fences and opening the highway. *Creanor v. Nelson*, 23 Cal. 464.

⁴ *Flemingsburg v. Wilson*, 1 Bush, (Ky.) 203. See also *Union Steam-Boat Co. v. City of Chicago*, 39 F. 723.

MOTIVES OF OFFICERS. — An allegation in a bill to enjoin the trustees of a village from taking complainant's land to widen a street, that the trustees, or a majority of them, own a large amount of real estate in the village, and that in taking complainant's land they were acting in pursuance of an illegal, unjust, fraudulent, oppressive, and unwarrantable scheme and design to deprive the complainant of his property, on the pretext of public necessity, but, in fact, for the sole purpose of enhancing the value of real estate in the village, thereby enabling them or their relatives and friends to make a more advantageous sale of their property, is not sufficient to show that the proposed widening of the street was merely for a private and not for a public use. The fact that the trustees were influenced in their action by the consideration of the incidental benefit they expected to their real estate would not render their action unauthorized and illegal, as the principal purpose was the enhancement of the value of all the real estate in the village by increased accommodation for public travel and transportation. *Dunham v. Hyde Park*, 75 Ill. 371.

junction would not lie to restrain the commissioners from building the wharf.¹

§ 636. **Illegal Use of Legal Process — Remedy by applying to Same Court.** — A person acting as an officer of the law under a judicial order ought not to be made a defendant to a bill for an injunction to restrain the execution of the order.² On the same principle an officer of a court who has obtained authority from it to sue is not only authorized, but bound to proceed with his action, and is not to be restrained by injunction out of another court, or by making him a party to a new action, and obtaining an injunction against him; but the proper method of restraining him is by application to the court whose officer he is, for instructions.³ Injunction will be granted, however, to prevent a justice of the peace of one township from exercising the duties of the office in another township.⁴

§ 637. **Same — Where Relief granted.** — But the court will not interfere by injunction to prevent in all cases the jurisdiction of the court, the validity of its process or orders, or the title of its officers, from being drawn in question in another court, by a suit against the officers or other persons acting under the authority of the court.⁵ And where process has been irregularly issued and set aside by the court on that account, or where an officer has transcended his authority, it is not a matter of course to stay proceedings against the wrong-doer in all other courts.⁶ Thus, an injunction was granted to restrain a sheriff from proceeding with a sale where he had refused to receive a sufficient affidavit of illegality;⁷ also in favor of a party in the quiet possession of real estate as owner, to restrain others from disposing him by means of process growing out of litigation to which he was not a party.⁸ And an injunction may be issued to restrain public officers from proceedings taken under an unconstitutional statute, which involve the imprisonment of the plain-

¹ *Payne v. English*, 79 Cal. 540; 21 P. 952.

² *McLane v. Manning*, 1 Wins. (N. C.) Eq. No. 2, 60; *Lackey v. Curtis*, 6 Ired. (N. C.) Eq. 199; *Chalie v. Pickering*, 5 L. J. Ch. 308.

³ *Winfield v. Bacon*, 24 Barb. (N. Y.) 154. See also *Chalie v. Pickering*, 5 L. J. Ch. 308.

⁴ *State v. Davies*, 12 Ohio Cir. Ct. R. 218.

⁵ *Mackay v. Blackett*, 9 Paige (N. Y.), 437.

⁶ *Ibid.*

⁷ *Clary v. Haines*, 61 Ga. 520.

⁸ *Banks v. Parker*, 80 N. C. 157.

tiff.¹ But it has been held that a bill to enjoin a defendant in execution and a sheriff from proceeding to appraise and set apart personal property levied upon as exempt, could not be maintained even though the statutes of the state have made it a felony for any officer to levy on and sell exempt personal property;² and in another case, notwithstanding it was alleged that the judgment and execution were for the purchase-money of the property.³

§ 638. **Same — Process from United States Courts.** — The United States circuit court has jurisdiction in equity, on bill or petition, to restrain the use of its process by the marshal in a manner contrary to law, if it is shown that injury will result which cannot be compensated in damages.⁴ And the district courts have jurisdiction to enjoin in whole or in part the execution of a treasury distress-warrant, whether the complainant is an officer against whom such warrant might lawfully issue or not.⁵

§ 639. **Imminency of Danger authorizing Injunction.** — Although the courts might interfere with the execution of a law annexing unreasonable conditions to the pursuit of a lawful business, yet they will not restrain the officers of the government from carrying out a law, on the application of a party who simply fears that he may be injured in a business which he proposes to undertake. He must first be pursuing his lawful business, and some unauthorized act be done or threatened.⁶ Nor can a suit in equity be maintained by a lot-owner in any incorporated city against the officers thereof, to restrain proceedings in the improvement of a street on which such lot abuts, upon apprehension that other officers will charge a part of the expense of the improvement upon the lot. Such suit can only be maintained where there has been an attempt under the proceedings to sell the lot, or the proceedings are of such character as necessarily to cast a cloud upon the title of the lot-owner.⁷ And it was held that the fact that a

¹ *Holt v. Commissioners of Excise*, 31 How. (N. Y.) Pr. 331, 337, note.

² *Phillips v. Crishton*, 17 Fla. 600.

³ *Christopher v. Bowden*, 17 Fla. 603.

⁴ *Gibbs v. Usher*, 1 Holmes, 348.

⁵ *United States v. Nourse*, 9 Pet. 8. Under the act of May 15, 1820, sec. 4 (3 Sts. 594), the decision of a district court joining a treasury distress warrant is final, and bars an action on the account which formed the subject-matter of the warrant and of the bill of complaint. *Id.*

⁶ *Mason v. Rollins*, 2 Biss. 99.

⁷ *Sperry v. City of Albina*, 17 Or. 481; 21 P. 453.

common council, which was not the judge of election of mayor, had, over the veto of the mayor, ordered an investigation as to whether he had been duly elected, did not entitle him to a preliminary injunction restraining it from declaring and certifying a result of the investigation adverse to his rights, as such investigation could not be made the basis of any valid resolution to oust him from office, even if injunction were the proper remedy in such case.¹ But where a city has already reached the limit of indebtedness permitted by its charter, and its council has passed an ordinance confirming a contract which may render it liable at any time to the payment of an additional annual sum, equal to three-fourths of the limit of its indebtedness as fixed by its charter, and directing that warrants shall be issued to pay such sum monthly when the terms of the contract are fulfilled, an injunction restraining the city charter from carrying out the contract cannot be considered as improvidently or prematurely issued.² And a United States circuit court has jurisdiction of a bill by non-resident creditors of a railroad company, to restrain railroad commissioners from doing any act injurious to their rights. They are not compelled to await positive action on the part of the commissioners.³

§ 640. **Modified Relief.** — The court may in granting relief consider its effect and adapt it to the situation of the parties and exigencies of the case. Thus, it being an open question whether commissioners were or were not authorized to fence a certain territory, under a stock law, it was held, that pending the determination of the question an injunction should not stop the work altogether, but only such portions of it as might afterwards be decided to be unwarranted.⁴ But where a bill has been filed, on the relation of the attorney-general, for an injunction against the state treasurer, to prevent his paying out money under an act of the legislature, on the ground of its unconstitutionality, if the judgment denies the injunction it should not go further, and decree the payment of the money according to the act.⁵

¹ *Garside v. City of Cohoes*, 12 N. Y. S. 192. See *Stahlhut v. Bauer*, (Neb.) 70 N. W. 496.

² *Davenport v. Kleinschmidt*, 6 Mont. 502; 13 P. 249.

³ *Piek v. Chicago, etc. R. R. Co.*, 6 Biss. 177.

⁴ *McNair v. Buncombe County Comm'rs*, 93 N. C. 370.

⁵ *People v. Pacheco*, 27 Cal. 175. Further as to what state of facts will

and will not constitute imminency of act or proceeding warranting preventive relief, see *Cox v. Fire & Police Commissioners*, 75 N. W. 35; *Cozart v. Fleming*, 31 S. E. 822; 123 N. C. 547; *Louisville & N. R. Co. v. McVean*, (Ky.) 34 S. W. 525; *State v. Commissioners of Ottawa County*, 5 Ohio N. P. 260; *Vornholt v. Gordon*, (Com. Pl.) 4 O. L. D. 498; *Lutman v. Lake Shore & M. S. Ry. Co.*, (Ohio Sup.) 47 N. E. 248; *Business Men's League v. Waddill*, (Mo.) 45 S. W. 262; 143 Mo. 406.

CHAPTER XV.

PERTAINING TO TAXATION.

- I. SCOPE OF AND LIMITATIONS UPON THE JURISDICTION.
 II. INSTANCES OF FACTS JUSTIFYING RELIEF.
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I. SCOPE OF AND LIMITATIONS UPON THE JURISDICTION.

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| <p>§ 641. Jurisdiction governed by General Principles.</p> <p>642. Jurisdiction derivable from Original Sources.</p> <p>643. Public Considerations.</p> <p>644. Tax wholly unwarranted by Law enjoined.</p> <p>645. Matter constituting Illegality must be clearly shown.</p> <p>646. Unconstitutional Tax.</p> <p>647. Doubtful Legality of Tax.</p> <p>648. State Tax in Contravention of Federal Statute.</p> <p>649. Existence of Remedy at Law as a Bar.</p> <p>650. Same — Before Official Board.</p> <p>651. Same — By <i>Certiorari</i>.</p> <p>652. Mere Irregularities no Ground for Relief.</p> <p>653. No Relief on Account of Mere Errors of Judgment.</p> | <p>§ 654. Relief granted where Assessment fraudulently excessive.</p> <p>655. Diligence in making Legal Remedies available.</p> <p>656. Diligence in seeking Equitable Relief.</p> <p>657. Same — Acquiescence by allowing Tax to be expended in Improvements.</p> <p>658. Essential Allegations.</p> <p>659. Questions involved in such Cases.</p> <p>660. Stage of Proceedings at which Relief granted.</p> <p>661. Injunction pending Action to determine Validity of Tax.</p> <p>662. Payment or Tender of Amount justly due as a Condition.</p> <p>663. Payment into Court — Allegation of Tender.</p> |
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§ 641. Jurisdiction governed by General Principles. — That injunctions have been granted against the enforcement of taxes when not warranted by the fundamental rules upon which courts have usually been governed, and often without a due regard to public convenience, or a proper consideration for the dependence of the government upon the collection of revenues to carry on its operations, no one who makes a study of the decisions can deny. But the departure from sound doctrine in these erroneous adjudications — erroneous in the light of the weight of authority — is not so difficult of detection, or so embarrassing in a discussion

of the subject, as has sometimes been supposed. Whatever the peculiarity of views enforced to meet the hardship of individual cases, the principles underlying the jurisdiction, and which should be observed in its exercise, are well established; and while it is often proper to give them a liberal application to avert injustice and gross fraud, yet they should in no case be ignored.

§ 642. **Jurisdiction derivable from Original Sources.**—Relief against illegal and unjust taxation is not an original head of equity jurisdiction. The attempt to enforce an illegal tax, or to sell property for its satisfaction, does not alone furnish any ground for interference. To entitle a party to relief by injunction he must present a case coming under some established head of the jurisdiction, such as fraud, mistake, prevention of multiplicity of suits, cloud upon title, or irremediable mischief.¹ This

¹ *Pacific Exp. Co. v. Seibert*, 12 S. Ct. 250; *Dows v. Chicago*, 11 Wall. 108; *Hannewinkle v. Georgetown*, 15 Wall. 547; *Schulenberg, etc. Co. v. Hayward*, 20 Fed. Rep. 422; *Wells v. Dayton*, 11 Nev. 161; *Wabash, etc. R. Co. v. Johnson*, 108 Ill. 11; *Truesdell's Appeal*, 58 Pa. St. 148; *Savings, etc. Soc. v. Austin*, 46 Cal. 415; *Munda v. Crystal Lake*, 79 Ill. 311; *Little Rock v. Prather*, 46 Ark. 471; *Porter v. Rockville, etc. R. Co.*, 76 Ill. 564; *First National Bank v. Cook*, 77 Ill. 622; *Maish v. Bird*, 22 Fed. Rep. 180; *Dundee Mortgage Co. v. School District*, 19 Fed. Rep. 559; *McDonald v. Murphee*, 45 Miss. 705; *Rome, etc. R. Co. v. Smith*, 39 Hun (N. Y.), 332; *McConkey v. Smith*, 73 Ill. 313; *Alexander v. Dennison*, 2 McArthur (D. C.), 562; *Mann v. Board of Education*, 53 How. (N. Y.) Pr. 289; *First National Bank v. Meredith*, 44 Mo. 500. In further support of the rule that special reasons for equitable interference must be shown, see *Hannewinkle v. Georgetown*, 15 Wall. (U. S.) 547; *Mutual Benefit Life Ins. Co. v. Supervisors of New York*, 33 Barb. (N. Y.) 322; *Douglas v. Harrisville*, 9 W. Va. 162; *Alabama, etc. Ins. Co. v. Lott*, 54 Ala. 499; *State Railroad Tax Cases*, 2 Otto (U. S.), 575; *Susquehanna Bank v. Broome Co.*, 25 N. Y. 312; *Burnes v. Atchison*, 2 Kan. 454; *Sayre v. Tompkins*, 23 Mo. 443; *Barrow v. Davis*, 46 Mo. 394; *Warden v. Supervisors*, 14 Wis. 672; *McPike v. Pew*, 48 Mo. 525; *McClung v. Livesay*, 7 W. Va. 329; *Bogert v. Elizabeth*, 10 C. E. Green (N. J.), 427; *Western R. Co. v. Nolan*, 48 N. Y. 513; *Clark v. Ganz*, 21 Minn. 387; *Kellogg v. Oshkosh*, 14 Wis. 620; *Harkness v. Board of Public Works*, 1 McArthur (D. C.), 121. Compare *Williams v. Peinny*, 25 Iowa, 436; *Wood v. Draper*, 24 Barb. (N. Y.) 187; s. c. 4 Abb. (N. Y.) Pr. 322; *Jeffersonville v. Patterson*, 32 Ind. 140. In *Southwestern Railroad Co. v. Wright*, 68 Ga. 311, the grounds of equitable jurisdiction by injunction were thus summarized: 1. Where exactions are pressed in the form of annual taxes, inconsistent with and violative of legal rights. 2. Because the exactions might be repeated and wrongs multiplied. 3. When misled by the act of the officer, which amounts to a legal fraud. 4. Because the numerous errors made as to different parts of the property assessed, and the liability of each portion dependent for adjudication on separate charters and amendments, and other questions in respect to other items of property in and out of this state, and in

comprehensive rule has been declared in many cases, and has been given practical recognition in nearly every state, and the courts may be said to hold with unanimity that injunction does not lie against the exercise of the power of taxation unless some special reason be shown for equitable interference.¹

§ 643. **Public Considerations.** — In administering this form of relief, personal consequences to the immediate complainant should be carefully distinguishable from those which result to the public. No great mischief can result from enjoining a tax which is illegal or unjust in some particular affecting only a single tax-payer; but where to adjudge it illegal would defeat the whole levy or assessment, the court should act with extreme caution, lest in awarding relief to one or several individuals all the operations of the government be embarrassed by arresting the only supply of revenue. A government could not calculate with any certainty upon the revenues if the collection of the taxes was subject to be hindered and delayed in every instance in which

what degree or how connected, and whether liable or not to be taxed, makes a complicated case that properly calls for the exercise of the powers of a court of equity to ascertain, adjust, and settle. Under acts N. C. 1887, ch. 84, 137, an injunction to restrain the collection of taxes cannot be granted except in the case of those "levied or assessed for an illegal or unauthorized purpose." *Mace v. Commissioners*, 99 N. C. 65; 5 S. E. 82. *Complainant's neglect.* — Where the president of a bank makes a return to the proper assessor, verified by his oath, showing that the bank is the owner of stock in a corporation of a certain value, and thereafter such return is properly filed in the office of the county clerk, and upon such return taxes are assessed and levied against the bank, the bank cannot enjoin the collection of such taxes on the ground that its capital stock is held by individual stockholders, as no showing for equitable relief on the part of the bank is presented, since the assessment and levy complained of were induced solely by the action of the bank. *Bank v. Fisher*, 26 P. 482; 45 Kan. 726, distinguished; *Winfield Bank v. Nipp*, (Kan.) 28 P. 1015.

¹ See *Clayton v. Lafargue*, 23 Ark. 137; *Murphy v. Harrison*, 29 Ark. 340; *Elyton Land Co. v. Ayres*, 62 Ala. 413; *Cooley on Taxation*, 586; *Minturn v. Hays*, 2 Cal. 463; s. c. 56 Am. Dec. 366; *Central Pac. R. Co. v. Corcoran*, 48 Cal. 65; *Hollister v. Sherman*, 63 Cal. 38; *Waterbury Savings Bank v. Lawler*, 46 Conn. 243; *Frost v. Flick*, 1 Dakota, 131; *Georgia Loan Association v. McGowan*, 59 Ga. 811; *Wilkerson v. Watters*, 1 Idaho, n. s. 564; *Missouri River, etc. R. R. v. Morris*, 7 Kan. 210, 231; *Brewer v. Springfield*, 97 Mass. 152; *Lord v. Charlestown*, 99 Mass. 209; *Hunnewell v. Charlestown*, 106 Mass. 350; *Pillsbury v. Humphrey*, 26 Mich. 245; *Christie v. Malden*, 23 W. Va. 667; *Corrothers v. Board of Education*, 16 W. Va. 527; *Miltimore v. Rock Co.*, 15 Wis. 9; *Ivinson v. Hance*, 1 Wyo. 270; *Scribner v. Allen*, 12 Minn. 148; *McDonald v. Murphree*, 45 Miss. 705; *Deane v. Todd*, 22 Mo. 90; *State v. Parkville, etc. R. Co.*, 32 Mo. 496; *Hoagland v. Delaware*, 17 N. J.

a tax-payer could make out a *prima facie* case for interference by injunction. It is far better to leave the individual to pay the tax at the time of its being demanded, and to his legal remedies for its recovery with interest, after more or less delay, if it be illegal.¹ "It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes should be interfered with as little as possible. . . . No court of equity will therefore allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the process of the law."²

§ 644. **Tax wholly unwarranted by Law enjoined.** — Always bearing in mind the principles just stated, injunction is the proper remedy to prevent the collection of an illegal tax;³ also to prevent the collection of a tax under a void assessment in the absence of an adequate legal remedy.⁴ Thus, where it appears

Eq. 107; *Rockingham Savings Bank v. Portsmouth*, 52 N. H. 17; *Brown v. Concord*, 56 N. H. 375; *Bank of Utica v. Utica*, 4 Paige (N. Y.), 399; s. c. 27 Am. Dec. 72; *Hanlon v. Supervisors of Westchester*, 57 Barb. (N. Y.) 383; s. c. 8 Abb. Pr. (N. Y.) n. s. 261; *Broadnax v. Groom*, 64 N. C. 244; *Burnett v. Cincinnati*, 3 Ohio, 73; s. c. 17 Am. Dec. 607; *Wharton v. School Directors*, 42 Pa. St. 358; *People's Savings Bank v. Tripp*, 13 R. I. 621; *Red v. Johnson*, 53 Tex. 284.

¹ *Eve v. State*, 21 Ga. 50; *Cody v. Lennard*, 45 Ga. 85. See also *Crevier v. New York*, 12 Abb. Pr. n. s. 340; *Steines v. Franklin County*, 48 Mo. 167; *Mo. Riv., etc. R. R. Co. v. Wheaton*, 7 Kan. 232. A creditor of a municipal corporation is not entitled to an injunction against the collection of his municipal taxes on the ground that the municipality is indebted to him. *Cartersville Waterworks Co. v. City of Cartersville*, 16 S. E. 70; 89 Ga. 689.

² *Dows v. Chicago*, 11 Wall. 109, 110, per Field, J.

³ Following *Galveston Co. v. Gas Co.*, 10 S. W. 583; *Davis v. Burnett*, 77 Tex. 3; 13 S. W. 613; *State v. Atkins*, 35 Ga. 315; *St. Louis & S. F. Ry. Co. v. Epperson*, 97 Mo. 300; 10 S. W. 478. A threatened sale of a railroad for non-payment of an illegal tax may be restrained by injunction. *Oliver v. Memphis, etc. R. R. Co.*, 30 Ark. 128. History of the decisions and statutes of Ohio, regulating the allowance of injunctions to restrain collection of illegal taxes. *Stephan v. Daniels*, 27 Ohio St. 527. The Arkansas act of April 24, 1873, conferring jurisdiction on courts of equity to enjoin the collection of illegal taxes and assessments, operated on suits pending at the time the act went into effect. *Vaughan v. Bowie*, 30 Ark. 278.

⁴ *Allwood v. Cowen*, 111 Ill. 481. The lawful levy of a tax after a complaint filed to restrain its collection under an alleged unlawful levy will not defeat the action. *Lake Shore & M. S. Ry. Co. v. Smith*, (Ind. Sup.) 29

that the board of commissioners had no jurisdiction to levy a tax, injunction to restrain its collection is the appropriate remedy.¹ And where the estimates were not fully in detail, and not under oath, and the taxes were largely in excess of the real estimates of the cost of the work in cash, it was held that the taxes themselves were illegal and, at least, voidable, and that the property owners were entitled to an injunction perpetually enjoining the collection of such taxes.² On like principle, a court of equity has jurisdiction to restrain by injunction the collection of a tax which has been certified by mistake of the clerk to have been voted, when, in fact, the proposition for the levy of the tax was defeated.³

§ 645. **Matter constituting Illegality must be clearly shown.** — But to authorize injunction to restrain the collection of taxes on the ground of illegality, it is necessary to show, not only the absence of legal remedy, but either that the property is exempt from taxation, or the levy is without legality, or the persons imposing it are unauthorized or have proceeded fraudulently.⁴ Whatever the matter rendering the tax illegal, it must be made clearly to appear; and where relief is sought on the last mentioned ground the proof of the fraud must be clear and irresistible, and the injury likely to result, considerable.⁵ Where relief is sought on account of partial illegality, the bill should show clearly to what extent the assessment is illegal, to enable the court to form its decree accordingly.⁶

§ 646. **Unconstitutional Tax.** — If the purposes for which the N. E. 1075; *Baltimore & O. & C. R. Co. v. Same*, Id. 1077. The Indiana statute regulating the establishment of free gravel roads imperatively requires notice of the time appointed for the meeting of the viewers, and the notice so provided for is the first one required to be given. *Held*, that the viewers cannot legally meet and transact business at a time different from that specified in the notice; and if there is no meeting pursuant to the notice, the proceedings are void, and an injunction may issue to restrain the collection of a special tax levied in aid of the road by virtue of such proceedings. *Hobbs v. Board of Comm'rs*, 103 Ind. 575; 3 N. E. 263.

¹ *Gavin v. County of Wells*, 104 Ind. 201; 3 N. E. 846.

² *Gilmore v. Hentig*, 33 Kan. 156; 5 P. 781.

³ *Cattell v. Lowry*, 45 Iowa, 478.

⁴ *Albany, etc. Mining Company v. Auditor-General*, 37 Mich. 391.

⁵ *Cooley on Taxation*, 536; *Union Trust Co. v. Webber*, 96 Ill. 846; *Lemont v. Singer, etc. Stove Co.*, 98 Ill. 94; *L. B. Price Co. v. City of Atlanta*, (Ga.) 81 S. E. 619.

⁶ *Cheney v. Jones*, 14 Fla. 587; *Merrill v. Humphrey*, 24 Mich. 170; *Taylor v. Thompson*, 42 Ill. 9; *Wison v. Weber*, 3 Ill App. 125.

taxes are to be expended after collection are unconstitutional, or not authorized by law, their collection will be enjoined.¹ Thus, an injunction will lie against the collection of a municipal tax levied for the purpose of paying bounties to soldiers, or freeing a town of a draft of citizens in time of public peril.² But injunction does not lie against a tax merely on account of the doubtful constitutionality of the law imposing it;³ nor against an unconstitutional tax prior to steps being taken for its collection.⁴

§ 647. **Doubtful Legality of Tax** — It is but another form of expressing the principle that courts of equity will not interfere, except where the illegality of the tax is clear, to say that where serious doubt exists as to the proper construction of a statute, upon the construction of which the validity of a tax depends, the relief will be refused.⁵ But a temporary injunction will sometimes be granted in such case conditionally, and in view of special circumstances, to restrain collection of taxes until the validity of the tax can be determined.⁶

¹ *Riggsbee v. Durham*, 94 N. C. 800. See also *Markoe v. Hartranft*, 6 Am. L. Reg. (Pa.) 487; *Hudson v. Marietta*, 64 Ga. 285; *Finney v. Lamb*, 54 Ind. 1; *McPike v. Penn*, 51 Mo. 63; *Foster v. Kenosha*, 12 Wis. 616; *Livingston Co. v. Weider*, 64 Ill. 427. But a mandatory injunction cannot be granted to rectify the unconstitutional application of money from taxes, where the whole purpose of the act providing therefor is the raising of a tax for such unconstitutional purpose, and there is no constitutional authority for the levy of such tax at all. *Davenport v. Cloverport*, (D. C.) 72 F. 689.

² *McMahon v. Welsh*, 11 Kan. 280; *Center Township v. Hunt*, 16 Kan. 430. See *contra*, *Truesdell's Appeal*, 58 Pa. St. 188. But a tax levied for the purpose of relieving the inhabitants of a municipality from a draft of its citizens under statutory authority will not be enjoined. *Hoagland v. Delaware*, 2 C. E. Green (N. J.), 106; *Vieley v. Thompson*, 44 Ill. 9.

³ *Appeal of the City of Scranton School District*, (Pa.) 1 A. 560.

⁴ In *Blake v. Brooklyn*, 26 Barb. 101, the court said: "If the assessment be illegal or unconstitutional the plaintiff cannot be compelled to pay it, and he need not anticipate in this way [by injunction] this defence to a suit at law. The assessment is not yet laid or its amount ascertained. Indeed, the work is not done or even commenced, and therefore there cannot be a pretence of a cloud upon the title of the land. If an assessment were laid, however, for the expense of this improvement, it is well settled that a bill in equity and an injunction are not the proper means to review or correct such proceedings of a municipal corporation."

⁵ *Hunnewell v. Cass Co.*, 22 Wall. 464. A preliminary injunction upon a tax-collection, asked on the ground that the ordinance authorizing the levy was void, refused because of doubts as to the facts connected with a passage of the same, and because of complainant's acquiescence therein for five months. *Burton v. Pittsburg*, 3 Pittsb. (Pa.) 242.

⁶ *Parmley v. St. Louis, etc. R. R. Co.*, 3 Dill. 18; *Bailey v. Pacific, etc. R. R. Co.*, Id. 22.

§ 648. **State Tax in Contravention of Federal Statute.** — The federal courts have undoubted jurisdiction to restrain the collection of taxes imposed by state statutes which are invalid by reason of their conflict with federal laws, or the exercise of their powers by federal agencies. Thus, the United States courts have frequently exercised jurisdiction to restrain the collection of taxes assessed against national banks at a greater rate than allowable under the National Bank Act.¹ So an act imposing a tax on express companies doing business in the state is void as to all interstate transportation, but valid as to all business to be exclusively performed within the state; and a levy of a tax on a company doing both a local and an interstate business will be enjoined until a separation between the two kinds of business can be made.² On a similar principle where no remedy exists to recover back illegal state taxes when paid into the treasury, a United States circuit court sitting in equity will restrain their collection, the plaintiff being otherwise without adequate remedy at law; and equity, having jurisdiction in such a case, will determine the validity of county as well as state taxes, embraced in the same collection warrant and levy.³ And where a state statute provides that an injunction may issue to restrain the collection of taxes illegally assessed, the federal court will enforce the remedy thus given, in a suit brought on the equity side of the court.⁴

§ 649. **Existence of Remedy at Law as a Bar.** — Where a remedy by action or special proceeding at law is provided by statute, it must be resorted to, and equity will not interfere. And it is well settled that, if an adequate legal remedy exists, a well founded fear of a multiplicity of suits would not warrant interference by the equitable remedy of injunction.⁵ On this principle, an injunction will be refused when sought to restrain the

¹ *Boyer v. Boyer*, 113 U. S. 689; *Evansville Bank v. Britton*, 105 U. S. 322; *Pelton v. Cleveland National Bank*, 101 U. S. 143; *New York v. Comm'rs of Tex.*, 4 Wall. (U. S.) 244; *Bradley v. Ill.*, 4 Wall. (U. S.) 459; *Lionberger v. Rouse*, 9 Wall. (U. S.) 468; *Adams v. Nashville*, 95 U. S. 19; *People v. Weaver*, 100 U. S. 539; *German Nat. Bank of Chicago v. Kimball*, 103 U. S. 732; *Rosenblatt v. Johnson*, 104 U. S. 462; *Albany Co. v. Stanley*, 105 U. S. 305; *Hills v. Nat., etc. Bank*, 105 U. S. 819; *First Nat. Bank of Omaha v. Douglas Co.*, 8 Dill. 298.

² *United States Express Co. v. Hemmingway*, 39 F. 60.

³ *First Nat. Bank of Omaha v. Douglas Co.*, 8 Dill. 298.

⁴ *Cummings v. Merchants' National Bank*, 101 U. S. 153.

⁵ *Equitable Guarantee & Trust Co. v. Donahue*, (Del. Ch.) 45 A. 588, citing numerous authorities.

collection of a tax levied by supervisors in the exercise of their official powers, the remedy against them, if any, being exclusively at law.¹ Accordingly, it is held that insolvency of the assessor is not a special reason which warrants enjoining the collection of a tax; for the tax-payer may have a remedy on his bond, or, by paying the tax under protest, he may sue the county to recover it back.² On the same principle the collection of an internal revenue tax from a manufacturer of tobacco will not be enjoined. The remedy for recovering back the tax, if illegally assessed, is exclusive.³ So where a statute provided that no injunction should issue against the collection of any tax, but all taxes should be paid, and demand made in writing for their return, and if this be not complied with, suit might be brought to recover them, it was held that an injunction should not issue at the instance of a railroad, against the collection of taxes levied on its lands, which both the federal and supreme courts decided were not subject to taxation.⁴ But while excessive assessments should be corrected by the course provided by law for such cor-

¹ *Van Rensselaer v. Kidd*, 4 Barb. (N. Y.) 17; *Mooers v. Smedley*, 6 Johns. (N. Y.) Ch. 28; *Wison v. New York*, 4 E. D. Smith, (N. Y.) 675; s. c. 1 Abb. (N. Y.) Pr. 4; *Messeck v. Supervisors of Columbia*, 50 Barb. (N. Y.) 190; *Bradish v. Lucken*, 38 Minn. 186; 36 N. W. 454; *Brown v. Concord*, 56 N. H. 375; and see *Hagenbuch v. Howard*, 34 Mich. 1; *Buffalo v. Town of Pocahontas*, 85 Va. 222; 7 S. E. 288; *White Sulphur Springs Co. v. Holly*, 4 W. Va. 597. The existence of an act making the levying a tax by county judges under an unconstitutional act a criminal offence held to be a bar to relief by injunction. *State v. Hager*, 91 Mo. 452; 4 S. W. 925. A court of equity will not restrain a city from selling land to pay a betterment illegally assessed thereon, for the reason that the owner of the land may have his remedy at law. *Hunnewell v. Charlestown*, 106 Mass. 350.

DEFENCE AT LAW.—In an action by several property owners to enjoin the collection of certain assessments for benefits to their property by the opening of a street, the bill alleged that plaintiffs were not made parties, and had no notice of such proceedings; that the special tax-bills were a cloud on the title of their property; and that plaintiffs were liable to be harassed by a multiplicity of suits. *Held*, that equity would not interfere, since plaintiffs had an adequate defence in any action at law for the collection of the tax if they were not notified of condemnation proceedings. *Michael v. City of St. Louis*, (Mo. Sup.) 18 S. W. 967.

² *Wells v. Dayton*, 11 Nev. 161. Compare *Richardson v. Scott*, 47 Miss. 236.

³ *Snyder v. Marks*, 109 U. S. 189.

⁴ *Raleigh & G. R. Co. v. Lewis*, 99 N. C. 62; 5 S. E. 82. On bill filed to restrain the collector from applying for judgment, and selling land for taxes of a prior year, on the ground that such taxes have been paid,—*held*, that the fact of payment was a complete defence to the proposed application for judgment, the remedy at law being complete. *Dunham v. Miller*, 75 Ill. 379. See also *St. Johns Nat. Bank v. Bingham Tp.*, (Mich.) 71 N. W. 588.

rection, yet where over-valuation has arisen from the adoption of a rule of appraisement which conflicts with a constitutional or statutory provision, a party may have a preventive remedy by resorting to equity to enjoin the collection of the excess upon payment or tender of the amount due upon a just valuation. And where a suit is not essential to the collection of a tax, and a penalty is imposed for delay in paying the tax, and no action lies to recover back the tax paid, equity has jurisdiction to determine the legality of the tax, and enjoin its collection if illegal.¹

§ 650. **Same — Before Official Board.** — In the case of mere irregularities and errors, a party may, by neglecting to go before the proper officer or board for the correction of the same, be barred from equitable relief from payment of the assessment.² A person aggrieved by the wrongful action of an assessor, in the valuation of his own or another's property for taxation, cannot maintain a suit in equity to enjoin the collection of any portion

¹ *Pacific Exp. Co. v. Seibert*, 44 F. 310; *Hoey v. Same*, Id.

² *O'Neal v. Virginia, etc. Co.*, 18 Md. 1; *Exch. Bank v. Hines*, 3 Ohio St. 1; *Delphi v. Owen*, 61 Ind. 29; *Schofield v. Watkins*, 22 Ill. 303; *Clinton, etc. Appeal*, 56 Pa. St. 315; *Livingston v. Hollenbeck*, 4 Barb. (N. Y.) 9; *Center, etc. Co. v. Oshkosh*, 14 Wis. 623; *Gay v. Herbert*, 25 La. An. 196; *Iowa, etc. Co. v. County of Sac*, 39 Iowa, 124; *Iowa, etc. Co. v. Carroll Co.*, 39 Iowa, 151; *Hollenbeck v. Hahn*, 2 Neb. 377; *Albany, etc. Co. v. Auditor-General*, 37 Mich. 391; *Metz v. Anderson*, 23 Ill. 463; *Munson v. Minor*, 22 Ill. 595; *Greene v. Mumford*, 5 R. I. 472; *Williams v. Mayor*, 2 Mich. 560; *Jackson v. Detroit*, 10 Mich. 248; *Challiss v. Commissioners of Atchison Co.*, 15 Kan. 49; *Stebbins v. Challis*, 15 Kan. 55; *Du Page Co. v. Jenks*, 65 Ill. 275; *Swinney v. Beard*, 71 Ill. 27; *Brown v. Herron*, 59 Ind. 61; *Whittaker v. Janesville*, 33 Wis. 76; *Western R. Co. v. Nolan*, 48 N. Y. 513; *Albuquerque Nat. Bank v. Perea*, (N. M.) 25 P. 776; *Hall v. Houston, etc. R. Co.*, 39 Tex. 286; *George v. Dean*, 47 Tex. 73; *Smith v. Commissioners of Leavenworth*, 9 Kan. 296; *Parker v. Challis*, 9 Kan. 155; *City of Lawrence v. Killam*, 11 Kan. 499; *Coulson v. Harris*, 48 Miss. 728; *Rio Grande R. Co. v. Scanlan*, 44 Tex. 649; *Huck v. Chicago, etc. R. Co.* 86 Ill. 352; *Adams v. Beman*, 10 Kan. 87; *Finnegan v. Fernandina*, 15 Fla. 379; *Murphy v. Harrison*, 29 Ark. 340; *Savings & Loan Society v. Austin*, 46 Cal. 415; *Dean v. Davis*, 51 Cal. 406; *Houghton v. Austin*, 47 Cal. 646; *Brown v. Concord*, 56 N. H. 375; *Burt v. Auditor-General*, 39 Mich. 126; *Hughes v. Kline*, 30 Pa. St. 227; *Dodd v. Hartford*, 25 Conn. 232; *Jones v. Sumner*, 27 Ind. 510; *West v. Whitaker*, 37 Iowa, 598; *Savings & Loan Society v. Ordway*, 38 Cal. 679; *Rockingham Savings Bank v. Portsmouth*, 52 N. H. 17; *Brown v. Concord*, 56 N. H. 379; *Floyd v. Gilbraith*, 37 Ark. 675; *Chicago, etc. R. Co. v. Siders*, 88 Ill. 320; *Wood v. Helmer*, 10 Neb. 65; *Burlington, etc. R. Co. v. Seward Co.*, 10 Neb. 211; *Powers v. Bowman*, 53 Iowa, 359; *Burlington, etc. R. Co. v. Saline Co.*, (Neb.) 7 Am. & Eng. R. R. Cas. 347; *Ryan v. Board of Comm.*, (Kan.) 3 Am. & Eng. Corp. Cas. 392; *Archer v. Terre Haute, etc. R. Co.*, 102 Ill. 394; s. c. 7 Am. & Eng. R. R. Cas. 249.

of the tax resulting from such action, unless he first seeks redress at the hands of the proper board of equalization, as provided by statute.¹ So where a revenue act affords a remedy to a tax-payer against excessive valuation by providing that the latter may require a copy of the assessor's valuation, and review by the town board, this is the legal remedy for over-valuation, and where the owner neglects to avail himself of it he cannot resort to any other.² And where under a statute, before taxes assessed can become a lien on land, the tax list must be presented to the board of equalization for approval and for the correction of any errors in the listing of property, an injunction will not be granted before such approval to restrain an assessor of a county from assessing lands alleged to be in another county.³ Indeed it may be stated as a general rule herein that statutes conferring jurisdiction on chancery courts of suits to restrain the collection

¹ *Dundee Mortgage Trust Invest. Co. v. Charlton*, 32 F. 192; *Breeze v. Haley*, 10 Col. 5; 13 P. 913; *Baldwin v. Shine*, 84 Ky. 502; 2 S. W. 164.

² *Humphreys v. Nelson*, 115 Ill. 45; 4 N. E. 637. Where a national bank, through its proper officers, voluntarily lists its stockholders' shares as the property of the bank for taxation, and the taxing officers tax the same in the name of the bank, equity will not relieve the bank from the payment of such tax by enjoining its collection, in the absence of application to all the statutory tribunals authorized to hear such matter and determine and grant the proper relief. *Albuquerque Nat. Bank v. Perea*, (N. M.) 25 P. 776. Plaintiff, in an action to restrain collection of taxes, alleged that his land was assessed at an agreed valuation between him and the assessor, who afterwards unlawfully listed it at a higher valuation; that he was cited to show cause before the Board of Equalization why his assessment be not raised, but he did not; that the board made no order changing or affecting the valuation of his land as theretofore listed; that the assessor had no power to change the assessment made by him without an order of the board in open court, and entered in the minutes; but he did not state that he applied to the board to correct the assessment, nor give a reason for not doing so, nor that he could not obtain relief in that way, if entitled to it. *Held*, that under Rev. St. Tex. art. 4715, which provides that the board shall have power to increase or diminish the valuation of any property, and affix a proper one, and that such action shall be final, and not subject to revision thereafter by said board or any other tribunal, plaintiff's failure to show cause, when cited, precluded him from afterwards questioning the increased valuation. *Duck v. Peeler*, 74 Tex. 268; 11 S. W. 1111. To same effect *Hazard v. O'Bannon*, 38 F. 220. In an action to enjoin the collection of a tax, upon the ground of its illegal levy, an answer alleging that an appeal was taken from the order of the Board of Commissioners levying the tax, but failing to show that the circuit court finally determined the case by levying the tax, or by remanding it with instructions to the board, is defective. *Lake Shore & M. S. Ry. Co. v. Smith*, (Ind. Sup.) 29 N. E. 1075; *Baltimore & O. & C. R. Co. v. Same*, Id. 1077.

³ *Chisholm v. Adams*, 71 Tex. 678; 10 S. W. 336.

of taxes levied or attempted to be collected without authority of law, does not entitle one who merely complains of an excessive assessment to exhibit a bill in chancery; such excessive assessment being remediable by application to the proper board of review and correction.¹ One who has not appealed from an assessment under a statute allowing an appeal to the circuit court, cannot bring a separate suit in equity for relief from such assessments.² The same rule applies when a remedy is given by petition in error.³ Nor will a sale of land for taxes be enjoined because, by a failure to file the assessment rolls within the time prescribed, the owner was prevented from appealing to the board of equalization, it not appearing that the land was not subject to taxation, nor that the tax was levied for an illegal purpose.⁴ But where, after the property of a tax-payer had been assessed and the taxes paid, the county commissioners, without notice to him, directed the clerk to enter an additional valuation on the property, and to charge additional taxes thereon, and the tax-payer afterwards applied to the board to set aside these taxes, it was held that the taxes so charged were void, and that the owner of the property could enjoin their collection, though he did not appeal from the refusal to set them aside.⁵

§ 651. **Same — By Certiorari.** — An action for an injunction will not lie to restrain the collection of the tax upon an illegal assessment, where there is a remedy to review and correct the assessment by *certiorari*, or to strike it from the roll by manda-

¹ See *County of Noxubee v. Ames*, (Miss.) 3 So. 37.

² *Dunkle v. Herron*, 115 Ind. 470; 18 N. E. 12. The duty of the board of revision is *quasi* judicial, and, where no appeal is taken, their decision concludes not only the landowner, but also his grantee; and an action to enjoin collection of the tax levied by the board will not lie. *Moore v. Taylor*, (Pa. Sup.) 23 A. 768.

³ *Haff v. Fuller*, 45 Ohio St. 495; 15 N. E. 479; *Lewis v. Laylin*, 46 Ohio St. 663; 23 N. E. 288.

PENDING APPEAL. — Where a party attempted to appeal from a judgment of the county court for the sale of his land for taxes, but which was not allowed for the reason that he refused to deposit the amount of the judgment, as required by statute, and he filed his petition in the supreme court for a mandamus to compel the allowance of his appeal, — *held*, that a court of equity would not entertain a bill to enjoin the sale of his land until the right of appeal could be decided. *Andrews v. Rumsey*, 73 Ill. 598.

⁴ *Frost v. Flick*, (Dak.) 46 N. W. 508.

⁵ *Topeka City Ry. Co. v. Roberts*, 45 Kan. 360; 25 P. 854; *Topeka Water-Supply Co. v. Same*, Id. 855.

mus.¹ Accordingly where, in an action to restrain the collection of a tax on personal property, the complaint alleged that the assessment was out of due proportion and too large in its valuation, and that it was null and void, because the parties who assumed to make it were not assessors either *de jure* or *de facto*, it was held that an injunction would not lie, there being no ground for equitable interference, as *certiorari* afforded an adequate remedy for the first wrong, and the remedy for the other wrong was an action against the collector for seizing property upon a warrant void on its face.²

§ 652. **Mere Irregularities no Ground for Relief.** — Equity will not interfere to restrain by injunction the collection of taxes where the property is subject to taxation, the tax legal, and the valuation not excessive, simply because of irregularities in the tax proceedings. This rule applies alike to general and special taxes, and whether the application be to restrain a sale or enjoin the execution of a deed.³ This rule is fairly applied to a case where the owner of cattle kept in a county is a non-resident, and a party who has been in charge lists them for taxation, and the valuation is fair and just, it being held that injunction will not lie to restrain the collection of taxes levied thereon, on the ground that the possession and control of the cattle had been, before the listing, turned over to another agent of the owner.⁴ What constitutes a mere irregularity and what a defect rendering the assessment void, was illustrated in a case where it was held that failure of a surveyor to give notice of an assessment for the repair of a public ditch, as required by law, is ground for an injunction, but that his failure to make out a certified copy of the assessment is not such failure, and does not invalidate his proceedings.⁵

¹ *Mutual Benefit Life Assurance Co. v. Supervisors of New York*, 3 Abb. (N. Y.) App. Dec. 344; *Carwin v. Campbell*, 45 How. Pr. 9; *Western R. R. Co. v. Noland*, 48 N. Y. 513.

² *Delaware & H. Canal Co. v. Atkins*, (N. Y.) 24 N. E. 319.

³ *Challiss v. Commissioners of Atchison Co.*, 15 Kan. 49; *West v. Ballard*, 32 Wis. 168; *Hammerslough v. Kansas City*, 46 Kan. 37; 26 P. 496; *Ryan v. Commissioners Leavenworth Co.*, 30 Kan. 185; 2 P. 156. See also *Sayre v. Tompkins*, 23 Mo. 443.

DRAINAGE. — An irregularity in an assessment for the construction of a ditch is not available to restrain an assessment for its repair. *Davis v. Lake Shore & M. S. Ry. Co.*, 114 Ind. 364; 16 N. E. 639.

⁴ *Graham v. Chautauqua Co.*, 31 Kan. 473; 2 P. 549.

⁵ *Davis v. Lake Shore & M. S. Ry. Co.*, 114 Ind. 364; 16 N. E. 639.

§ 653. **No Relief on Account of Mere Errors of Judgment.** — Equity will not interfere to correct mere errors of judgment or the exercise of discretion not amounting to oppression and fraud in making the valuation or assessment.¹ Accordingly it is held that where a state board of equalization acting under the law and within the scope of its authority has fixed the value of the capital stock and franchises of a corporation for purposes of taxation, their action cannot be impeached except for fraud; and equity will not enjoin proceedings or the enforcement of the tax because of errors of judgment on the part of such board.² And where the levy of a tax for school purposes is properly made, and is within the statutory limit, it is no ground for enjoining its collection that the levy was unnecessarily large, or that the directors proposed to divert part of the money raised to another

¹ *Chicago, etc. R. Co. v. Frary*, 22 Ill. 86; *Swinney v. Beard*, 71 Ill. 30; *Andrews v. Rumsey*, 75 Ill. 600; *Du Page Co. v. Thompson*, 44 Ill. 13; *Merritt v. Farris*, 22 Ill. 312; *Metz v. Anderson*, 23 Ill. 410; *Cook Co. v. Chicago, etc. R. Co.*, 35 Ill. 465; *Vieley v. Thompson*, 44 Ill. 13; *Huck v. Chicago, etc. R. Co.*, 86 Ill. 360. In *Le Roy v. New York*, 4 Johns. Ch. 352, Chancellor Kent said: "I cannot find that the court interferes in cases of this kind, where the act complained of was done fairly and impartially according to the best judgment and discretion of the assessors, and a precedent once set would become very embarrassing and extensive in its consequences. If the power under this statute had been exercised in bad faith and against conscience, I might have attempted to control it; but a mere mistake of judgment in a case depending so much upon sound discretion cannot properly be brought into review under the ordinary powers of this court. There must have been a thousand occasions and opportunities for the exercise of such an appellate jurisdiction in the history of the jurisprudence and practice of the English court of chancery, if such a jurisdiction existed, and yet we find no precedents to direct us. A mistake of judgment in the assessors upon the matter of fact what portion or district of the city was intended to be and actually was benefited by the common sewer, can hardly be brought within the reach of that head of equity jurisdiction which relates to breaches of trust. Here is not strictly speaking a violation of duty. No bad faith or partiality in the assessors is pretended. The aid of this court might as well be asked to review every assessment of a land tax or a poor rate. I apprehend it would require a special provision by statute to authorize chancery to interfere with these assessments." Section 19 of the United States Internal Revenue Act of July 13, 1866 (14 Stat. at L. 152), as amended March 2, 1867 (Id. 475), — which provides that no suit to restrain the assessment or collection of any tax shall be maintained in any court, — applies to all cases where the officer has power to inquire and determine whether the thing assessed by him is liable to taxation, however erroneous his decision may be. *Pullan v. Kinsinger*, 2 Abb. U. S. 94.

² *Porter v. Rockford, etc. R. Co.*, 76 Ill. 561; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556. See also *Hazard v. O'Bannon*, 88 F. 220.

purpose.¹ In the absence of fraud the fact that an assessment was excessive is uniformly held no ground for relief.² Nor will injunction issue to restrain the collection of a tax on the ground that the assessment is excessive, where the tax-payer has an ample remedy, which he has failed to pursue, before the town board of review.³

§ 654. **Relief granted where Assessment fraudulently excessive.**—It is a fraud upon a non-resident tax-payer justifying an injunction, for officers intrusted by law with the duty of making an assessment to assess it above its real value for the purpose of relieving resident tax-payers of their due proportion of taxation.⁴ But the injunction in such case should not extend to the entire tax, and should only be allowed upon payment of the proportion which is justly due.⁵ And while the court will not interfere to review the conclusion of the assessors' judgment, yet it will correct an arbitrary and capricious exertion of official authority, founded not on the exercise of the officers' discretion, but upon resentment, cupidity, or malice.⁶ The rule is that a court of equity will interfere by injunction in a clear case of reckless disregard of duty whereby a grossly arbitrary and unreasonable valuation is placed upon property. The valuations must be the result of honest judgment and not of mere will.⁷ Accordingly, under

¹ *Lawrence v. Trainer*, (Ill.) 27 N. E. 197.

² *La Salle & P. H. & D. R. Company v. Donoghue*, 127 Ill. 127; 18 N. E. 287.

³ *Camp v. Simpson*, 118 Ill. 224; 8 N. E. 308.

⁴ *California & O. Land Co. v. Gowen*, (Cir. Ct.) 48 F. 771. See *Moss v. Board of Education of Special School Dist. No. 1*, 50 N. E. 921; 58 Ohio St. 354.

⁵ *Merrill v. Humphrey*, 24 Mich. 170. Where a board of equalization has found as a fact that the property of a non-resident has not been overvalued by the assessor, and has declined to reduce the assessment, the circuit court, on a writ of review to such board, is bound by its finding as to the assessable value of the property; and hence such writ does not afford an adequate remedy to the tax-payer, who alleges that his property was assessed beyond its cash value, and at a much heavier rate than the property of resident tax-payers, and he may resort to a court of equity to restrain the collection of such tax. *California & O. Land Co. v. Gowen*, (Cir. Ct.) 48 F. 771.

⁶ *Merrill v. Humphrey*, 24 Mich. 170.

⁷ In *Chicago, etc. R. Co. v. Cole*, 75 Ill. 591, the court said: "If, as it must be sustained, the rule adopted by the Board of Equalization by which to be governed in making this class of assessments may be regarded as the honest expression of judgment of a majority of the board, then it is plain that this assessment, because in violation of that rule and consistent with no other

certain circumstances, an injunction restraining the collection of taxes will be granted, where the assessors of a city have made an assessment for city purposes greatly in excess of the triennial assessment for state and county purposes made the previous year.¹ And a bill to enjoin a levy on personalty under a tax-bill, pending *certiorari* proceedings against the board of equalization to correct the assessment, which alleged that the assessor, illegally, wilfully, and erroneously, assessed complainant's land at a fictitious and speculative value, more than double the valuation of other like lands in the county, assessing wild lands and lands having no mineral the same as improved and mineral lands, shows a fraudulent assessment, and the writ under which defendant seeks to collect the tax not being void, and therefore a protection against a suit for trespass, the injunction will be granted as to such an amount as is claimed to be excessive.²

reasonable theory of valuation, cannot be the honest judgment of a majority of that board. It is an arbitrary and unreasonable valuation. Because the law has devolved on the Board of Equalization, and not on the courts, the duty of making such valuations, we hold it is not the duty of the courts to exercise any supervisory care over its valuations, so long as it acts within the scope of the powers with which it is invested, and in obedience to what might reasonably be presumed to be an honest judgment, however much we may disagree with it. But whenever the board undertakes to go beyond its jurisdiction, or to fix valuations through prejudice or a reckless disregard of duty, in opposition to what must necessarily be the judgment of all persons of reflection, it is the duty of the courts to interfere to protect tax-payers against the consequences of its acts. See also *Dean v. Davis*, 51 Cal. 407; *Mutual, etc. Ins. Co. v. Supervisors of N. Y.*, 3 Keyes (N. Y.), 182; s. c. 3 Abb. (N. Y.) Dec. 344; 33 Barb. (N. Y.) 322; 8 Bosw. (N. Y.) 683; *Kilbourne v. Allyn*, 7 Lans. (N. Y.) 352; *State Railroad Tax Cases*, 92 U. S. 575.

¹ *Appeal of Kemble*, 135 Pa. St. 141; 19 A. 946.

² *Hazard v. O'Bannon*, 36 F. 854. In *West v. Ballard*, 32 Wis. 168, it was held that a county board, in making the "county assessments," is not required to receive any testimony as to the relative values of property in the several towns, etc., of the county, and is not bound by the valuation of property in the assessment rolls of such towns, but acts upon its own judgment and discretion; there is no appeal from its determination; nor has equity jurisdiction to set aside or interfere with the assessments thus made, even if corruptly made, with intent to compel one town or city to pay more than its rightful proportion of tax, except that if it has imposed a county tax for a larger amount than is needed to pay the current expenses of the county, with the fraudulent intent (as is alleged in the complaint) of applying the excess to an unlawful purpose, and if the board shall vote to pay out any part of the money to such unlawful purpose, and there shall appear to be no adequate legal remedy, equity will then interfere to prevent such payment without setting aside the assessment.

§ 655. **Diligence in making Legal Remedie available.** — The collection of an assessment will not be restrained by injunction on the bare ground that the statute under which it is imposed is unconstitutional, nor on the ground of irreparable injury to plaintiff, where there will be no injury greater than would result from the collection of any tax, especially where plaintiff had a remedy at law, and has lost it by delay.¹ And where complainant failed to return his property for taxation and the assessor returned it, as required by statute, notifying complainant, who, after the time for appeal, applied to the commissioners for relief, alleging that he was misled by figures in the notice, and the commissioners offered to substitute his return for that of the assessor even then, if he would file one, which he failed to do, it was held that the collection of the tax would not be enjoined.² Proceedings to enforce an additional road assessment, begun before the additional assessment was made and placed on the roll, will be enjoined, though the assessment was duly made after the injunction suit was commenced, but was not pleaded in the answer.³

§ 656. **Diligence in seeking Equitable Relief.** — The general rule that a party will deprive himself of the benefits of equitable relief by laches and unexplained delay in seeking it, applied in these as in other cases. To justify a resort to equity to stay the collection of public revenues, the party must make a case strictly within the bounds of equity jurisdiction, and he must seek and pursue his remedy with promptitude.⁴ Thus where plaintiff furnished to the county treasurer an incomplete list of his property, asking delay in the payment of his taxes, and later taking a receipt which included but half his tax, paid the amount of it, and, failing to examine the receipt, permitted his property to be sold for the residue of his tax, and a certificate to be transferred to a third person, he was not allowed to have the sale certificate set aside because a part of the tax paid was illegal.⁵ And where a majority of the complainants having voted in favor of the approval of a local school law, and all of them having acquiesced in the result of the election, until, after a school was established and put into operation, an interlocutory injunction restraining

¹ *Postal Tel. Cable Co. v. Grant*, 11 N. Y. S. 323.

² *Appeal of Van Nort*, 121 Pa. St. 118; 15 A. 473.

³ *Tucker v. Sellers*, (Ind. Sup.) 30 N. E. 531; *Same v. O'Neal*, Id. 533.

⁴ *American Dock & Improvement Co. v. School Trustees*, 35 N. J. Eq. 181.

⁵ *Franz v. Krebs*, 41 Kan. 223; 21 P. 99.

the collection of a tax authorized by the local law, and levied for supporting the public-school system provided for by said law, was held properly denied.¹ On the same principle, long acquiescence in the validity of annexation proceedings constitutes a bar to a suit to enjoin the collection of taxes on the ground of the invalidity of the proceedings.² But mere delay in bringing an action to enjoin the collection of assessments on land for opening a road, during which time other owners pay their assessments, does not of itself estop plaintiffs to maintain such action.³

§ 657. **Same — Acquiescence by allowing Tax to be expended in Improvements.** — If a tax-payer and property-owner allows municipal improvements to be carried on in front of his premises without objection, he will be held chargeable with notice and to have acquiesced, so that he cannot afterwards have the collection of a tax to pay for such improvements enjoined without payment of the amount by which his property is benefited.⁴ Accordingly, one who has made no objection to the construction of a drain, who has conveyed a right of way for it across his land, has had notice of the time for reviewing assessments, as for every other step in the proceedings, has aided in the work and received all the benefits of it, is estopped in equity to contest his assessment for irregularity in the proceedings.⁵ And in such case, the complainant must do equity by paying the amount justly chargeable against his property.⁶

§ 658. **Essential Allegations.** — In determining what is necessary to allege in an action to enjoin the collection of a tax, regard must be had to the general principle that an injunction will

¹ *Irvin v. Gregory*, 86 Ga. 605; 13 S. E. 120.

² *Logansport v. La Rose*, 99 Ind. 117.

³ Modifying 2 N. Y. S. 426; *Speir v. Town of New Utrecht*, 121 N. Y. 420; 24 N. E. 692. See also *Lyon v. Town of Tonawanda*, 98 F. 361.

⁴ *Barker v. Omaha*, 16 Neb. 269; s. c. 4 Am. & Eng. Corp. Cas. 293; *Weber v. San Francisco*, 1 Cal. 455; *Lafayette v. Fowler*, 34 Ind. 140; *Hellenkamp v. Lafayette*, 30 Ind. 192; *Evansville v. Pfister*, 34 Ind. 36; *Sleeper v. Bullen*, 6 Kan. 300; *Motz v. Detroit*, 18 Mich. 495; *Kellogg v. Ely*, 15 Ohio St. 64; *Patterson v. Bauer*, 43 Iowa, 483; *Tone's Ex'r v. Columbus*, 39 Ohio St. 281; s. c. 3 Am. & Eng. Corp. Cas. 644. See also *Taber v. New Bedford*, 135 Mass. 162; s. c. 3 Am. & Eng. Corp. Cas. 678; *Landis v. Hamilton*, 77 Mo. 554; s. c. 4 Am. & Eng. R. R. Cas. 491; *Wallace v. Orangeville*, 5 Ontario Rep. 37; s. c. 4 Am. & Eng. Corp. Cas. 354.

⁵ *Hall v. Slabaugh*, 69 Mich. 484; 37 N. W. 545.

⁶ Following *Barker v. Omaha*, 16 Neb. 269; 20 N. W. 382; *Darst v. Griffin*, (Neb.) 48 N. W. 819.

not lie to restrain the collection of taxes merely because the tax is illegally levied; but there must be some special circumstances bringing the case within some recognized head of equity jurisdiction, such as that the plaintiff will be without an adequate remedy at law, or that such remedy will be practically valueless. This must be shown by alleging traversable facts. Where a complaint charges an intention to take and sell the property, and then proceeds, "thereby subjecting the plaintiffs to great costs and expense, and involving them in expensive and vexatious litigation and a multiplicity of suits, in order to keep the control of their property and prevent an unjust sacrifice thereof," the part quoted does not allege traversable facts.¹ Thus, where a bill to enjoin collection of a school-tax alleged that the determination to levy was not made by the school directors at a regular or special meeting, nor in their corporate capacity, but as individuals, it was held that such allegations did not charge that the directors acted in the matter without meeting together.²

¹ *Clark v. Ganz*, 21 Minn. 387; *Duck v. Peeler*, 74 Tex. 268; 11 S. W. 1111; *Stewart v. Comm'rs*, 45 Kan. 708; 26 P. 683; *Board Comm'rs Wyandotte County v. Arnold*, (Kan.) 30 P. 486; *Trimble v. McGee*, 112 Ind. 307; 14 N. E. 83. *Held*, where one alleging his lands to be in a certain county sought to restrain the assessor of another county from listing them, on the ground that they would thereby be subject to double taxation, that the petition was insufficient which did not aver that the abstract showed the land to be in the former county. *Chisholm v. Adams*, 71 Tex. 678; 10 S. W. 336.

LEGAL REMEDY NEED NOT BE ALLEGED AS DEFENCE. — In a proceeding in equity the objection that there is a plain and adequate remedy at law is jurisdictional, and a bill for injunction to restrain the collection of a tax must be dismissed, where such a remedy exists, notwithstanding the objection is not raised by the defendant either by plea, demurrer, or answer. *Hoey v. Coleman*, 46 F. 221.

SHOULD STATE AMOUNT OF EXCESS. — A petition which alleges that a city has exempted a water company from taxation, in consideration of its supplying the city with water at reduced rates, and that plaintiff tax-payer is thereby obliged to pay higher taxes than he otherwise would, is insufficient to entitle him to maintain an action to enjoin the amount of such illegal excess, when neither the amount thereof, nor other amounts from which it may be calculated, is averred. *Altgelt v. City of San Antonio*, (Tex. Sup.) 17 S. W. 75.

STIPULATION IN LIEU OF PLEADINGS. — The remedy by injunction against the collection of an invalid tax, *held* available where, although the pleadings did not make out a case for such relief, the parties stipulated certain facts going to show that a multiplicity of suits would be avoided by jurisdiction being taken in equity. *Philadelphia, W. & B. R. Co. v. Neary*, (Del.) 8 A. 363.

² *Lawrence v. Trainer*, (Ill.) 27 N. E. 197.

And a bill to enjoin the collection of a tax on the capital stock of a corporation on the ground of fraud in the assessment, which merely charges fraud in general terms, and alleges that the board of equalization assessed the stock at a higher valuation than that stated in the corporation's return to the board, without any further knowledge or information than that furnished by said return, is demurrable.¹ So where it does not appear that persons whose lands were assessed for repair of a drain were not given notice in time to appeal, they cannot maintain an injunction on the ground of irregularities in the proceedings of the township trustee.²

§ 659. **Questions involved in such Cases.** — The limits to the inquiry in actions brought to enjoin the enforcement of taxes depend, of course, to a great extent upon the ground relied upon for relief, the allegation in the complaint, and the answer. Still, a few principles of general application in relation to the scope of the inquiry are deducible from the authorities; but they can only be given in the form of negative statements, since it is easier to state what issues will not, than those which will be tried. An injunction to restrain the making repairs upon a levee in a swamp-land district will not be granted, upon an allegation that the district is not a public corporation,³ since such a point cannot be raised collaterally; nor because certain land in the district has been omitted from the assessment list; nor because the levee was constructed in the first instance without the previous adoption of a plan as provided for in the act; nor because, in plaintiff's opinion merely, the scheme of repair is impracticable.⁴ Questions in relation to the validity of the

¹ *Sterling Gas Co. v. Higby*, (Ill.) 25 N. E. 660.

² On authority of *Trimble v. McGee*, 112 Ind. 307; *Wisman v. McGee*, 112 Ind. 600; 14 N. E. 375.

³ *Keigwin v. Hamilton Drainage Comm'rs*, 115 Ill. 347; *Hoke v. Perdue*, 62 Cal. 545. The question whether or not a town is legally incorporated cannot be raised by bill to enjoin the tax-collector of the town from selling complainant's property for taxes levied by said town, complainant's remedy being by *quo warranto*. *Bateman v. Florida Commercial Co.*, 26 Fla. 423; 8 So. 51.

⁴ *Hoke v. Perdue*, 62 Cal. 545. *Municipal Contract.* — In an action by a tax-payer to enjoin the erection of a bridge by a town, which it had been authorized to build by the county board, on the ground that the whole proceeding was a conspiracy to divert the public money to the private purpose of draining certain swamp lands, plaintiff further urged that a valid contract for building the bridge had previously been entered into by the commissioner of

judgments rendered against a parish, and appropriations made by the police jury to pay them, and other accounts of the receiving and disbursing officers of the parish, cannot be inquired into in an injunction suit brought by a tax-payer against the tax-collector of the parish. Nor can the right to the office of the tax-collector, or any other officer in the parish, be tested in such a proceeding.¹

§ 660. **Stage of Proceedings at which Relief granted.** — A complaint to enjoin the collection of a tax, which only shows that the plaintiff has been assessed for the tax complained of, but does not show that an attempt to collect the tax is actively proceeding, shows no cause of action.² Before the levy or collection of a tax can be enjoined, some step must be taken by the taxing officers towards the levy or collection.³ The objections that the property was not legally or properly assessed, and that the evidence did not authorize the judgment, cannot be raised on application for an injunction to restrain execution of a judgment for taxes; they should have been interposed to resist recovery of the judgment. But that defendant was not cited may be ground for an injunction.⁴

§ 661. **Injunction pending Action to determine Validity of Tax.** — It may sometimes be proper to temporarily enjoin the collection of a tax pending an action at law to test its validity. Thus, it was held no abuse of discretion for the trial court to temporarily enjoin the collection of the tax until after the final hearing of an action brought by a city against an adjoining county to

highways, and that the subsequent contract should, on that account, be declared invalid. *Held*, insufficient ground for an injunction, the validity of the action of the board of supervisors, and not the validity of the contracts, being in question. *Barker v. Town of Oswepatchie*, (Sup.) 16 N. Y. S. 727.

¹ *Lambeth v. De Bellavue*, 24 La. An. 394.

² *Pugh v. Irish*, 43 Ind. 415.

³ *Bridge Co. v. Commissioners*, 10 Kan. 326; cited and followed, *Challiss v. City of Atchison*, 39 Kan. 276; *Manley v. Same*, Id. 278. When the tax-roll is placed in the hands of the tax-collector, and the levying and assessing officers have become *functus officio*, the legality of such tax cannot be tested with the collector alone in an injunction suit. *Gaither v. Green*, 40 La. An. 362; 4 So. 210.

⁴ *Gardner v. Levasseur*, 28 La. An. 679. A road supervisor is not entitled to an injunction to restrain the collection of road taxes by one who is illegally attempting their collection, and who, probably, will misapply them. *Pettyjohn v. Parmenter*, 10 Or. 341.

have the validity of the assessment determined.¹ But the fact that a writ of *certiorari* has been sued out in the state court to review the proceedings of the board of equalization of taxes, and that that proceeding is still pending, does not entitle the complainant to apply to the federal court to stay the collection of the tax until that proceeding is determined, as complainant may apply to the state court for such relief. Nor does the general allegation that the people and officers of the county are prejudiced against complainant confer any jurisdiction on the federal court.²

§ 662. **Payment or Tender of Amount justly due as a Condition.** — The great preponderance of authority is to the effect that an injunction will not lie to prevent the collection of taxes, a portion of which are legally assessed, without an allegation in the complaint that complainant has paid the amount legally due, or that, in addition to having tendered the amount to the collector, he keeps the tender good by bringing the amount into court.³ But this rule has not been universally recognized.⁴ Underlying this rule are two well-established principles. In the first place, he who seeks equity must do equity;⁵ and secondly,

¹ *Magruder v. City of Augusta*, 86 Ga. 220 ; 12 S. E. 587; *City of Augusta v. Magruder*, Id. Following were the important facts in this case: A city owned a canal situated partially in an adjoining county, and used it both to furnish a public water supply and for revenue by renting out water-power. It was used somewhat as a public water-way. There was no law providing a machinery for the assessment of taxes against the canal, nor any means by which its value as a whole in the two counties could be ascertained; but the adjoining county assessed a tax against so much of the canal, and the dams and bulkheads, as were situated within its limits.

² *Hazard v. O'Bannon*, 38 F. 220, overruling same case, 36 F. 854.

³ *Hewett v. Fenstemaker*, 128 Ind. 315 ; 27 N. E. 621; *Hyland v. Coal Co.*, 128 Ind. Sup. 335 ; 26 N. E. 672, explained; *Hyland v. Central Iron & Steel Co.*, (Ind. Sup.) 28 N. E. 308; *Rosenburg v. Weekes*, 67 Tex. 578 ; 4 S. W. 899 ; *Loesnitz v. Seelinger*, 127 Ind. 422 ; 25 N. E. 1037 ; *Rio Grande R. R. Co. v. Scanlan*, 44 Tex. 649; *Hagaman v. Cloud County*, 19 Kan. 394 ; s. p. *Worthen v. Badgett*, 32 Ark. 496 ; *Burlington, etc. R. R. Co. v. York County*, 7 Neb. 487. Where a bill was filed to restrain the collection of an excessive tax, and the court found the tax to be excessive, and thereupon made a decree perpetually enjoining the collection, not only of the amount that was excessive, but of the whole tax, — *held*, that the decree was wholly unwarranted, and it was thereupon reversed. *Merrill v. Humphrey*, 24 Mich. 170.

⁴ See *Ball v. City of Meridian*, 67 Miss. 91 ; 6 So. 645; *Hyland v. Coal Co.*, (Ind. Sup.) 26 N. E. 672, explained ; *Hyland v. Central Iron and Steel Co.*, (Ind. Sup.) 28 N. E. 308.

⁵ *Swinney v. Beard*, 71 Ill. 27 ; *Mullikin v. Reeves*, 71 Ind. 281; *Rinard*

a party will not be allowed to withhold taxes legally due, and thus impede or embarrass the operations of the state government, or of any subdivision thereof, by joining it with that about which there is a real ground of contest. But if the officer whose duty it is to collect the taxes refused to receive part without payment of the entire demand, the tax-payer seeking relief should tender the portion which he concedes to be due without annexing as a condition that a receipt shall be given for the entire assessment.¹ But in a suit to enjoin the collection of taxes, when the original assessment was void, there is no necessity for a tender of such sum as might be equitably due on account of such taxes.² On the same principle, where the entire capital stock of a corporation is invested in tangible property duly assessed, the corporation need not, in order to restrain the collection of a tax on the capital stock, make a tender of the taxes due on its tangible property, as no tax whatever is due on the capital stock.³

§ 663. **Payment into Court — Allegation of Tender.** — When a party applies to the circuit court of the United States to enjoin the collection of taxes, or the collection of part of a tax, if there is any part which he admits to be due or just, or which the court can see in the statement made in the bill ought to be paid, there must be an allegation in the bill conforming to the fact that he has paid it, or tendered it, and it is not a sufficient allegation to come and say that he is willing, or even that he has paid it into court, because the state is not to be stayed in its revenue, which is admitted to be due, in that way; and a party claiming that he

v. Nordyke, 76 Ind. 180; *Comm'rs of Osborne Co. v. Blake*, 19 Kan. 299; *National Bank v. Kimball*, 103 U. S. 732; *Alabama, etc. Ins. Co. v. Lott*, 54 Ala. 499; *Worthen v. Badgett*, 32 Ark. 496; *Johnson v. Roberts*, 102 Ill. 655; *Morrison v. Hershire*, 32 Iowa, 271; *Overall v. Ruenzi*, 67 Mo. 203; *Merrill v. Humphrey*, 24 Mich. 170; *Pillsbury v. Humphrey*, 26 Mich. 245. Where a corporation refuses to pay a valid license tax, it is not entitled to the aid of a court of equity to protect its franchise from the enforcement of such tax. *Nashville, C. & St. L. Ry. Co. v. City of Attalla*, (Ala.) 24 So. 450.

¹ *State Railroad Tax Cases*, 92 U. S. 616; *National Bank v. Kimball*, 103 U. S. 735; *Blanc v. Meyer*, 59 Tex. 89; *Rowe v. Peabody*, 102 Ind. 198; *Connors v. Detroit*, 41 Mich. 128; *Huntington v. Palmer*, 7 Sawy. (U. S.) 355; *Woods v. Helmer*, 10 Neb. 65; *Hunt v. Easterday*, 10 Neb. 165; *London v. Wilmington*, 78 N. C. 109.

² *Board of Co. Comm'rs of Valencia Co. v. Atchison, T. & S. F. R. Co.*, 3 N. M. 352; 10 P. 294.

³ Distinguishing *City of Logansport v. Case*, 124 Ind. 254; 24 N. E. 88; *Hyland v. Brazil Block Coal Co.*, 128 Ind. 335; 26 N. E. 672.

will not pay his taxes, or any portion of them, cannot screen himself during the course of a long litigation, from paying that which must be paid, or ought to be paid, by setting up a contest over that which is doubtful, and which may or may not be necessary to be paid.¹ But generally where a bill to enjoin the collection of taxes avers a tender by complainant to the collector of all taxes legally assessed, and seeks to enjoin the excess only, which was illegally levied, it is not a good objection to the bill that the taxes admitted to be due were not paid or tendered, though the offer is not repeated by the bill.²

II. INSTANCES OF FACTS JUSTIFYING RELIEF.

§ 664. Relief granted where Extrinsic Evidence required to show Invalidity.	§ 670. When not granted prior to making Levy.
665. Cloud upon Title.	671. Prevention of Tax Sale and Deed thereunder.
666. Avoidance of Multiplicity of Suits.	672. Same — Exempt Property.
667. Municipal Taxes.	673. Same — When Tax Sale of Personality enjoined.
668. Same — Railroad Aid Taxes; Parties.	674. General Result of Authorities — Relief under Peculiar Circumstances.
669. Disregard of Option to work out Taxes.	

§ 664. Relief granted where Extrinsic Evidence required to show Invalidity. — A proper case for equitable interference is presented where the record of the tax proceeding is *prima facie* valid and regular, and extrinsic evidence is required to show its invalidity, so that there is not a full and adequate remedy at law to correct an abuse of the taxing power.³ Thus, a court of equity will grant to an aggrieved party relief against an assessment for a local improvement, which, on the face of the proceeding to impose it, is a valid lien on the land.⁴ But the equitable powers of a court cannot be invoked by one alleging that he is injured by the imposition of a public tax or assessment affecting

¹ *Parmley v. St. Louis, etc. R. R. Co.*, 3 Dill. 25. And see *Paul v. Missouri Pacific R. R. Co.*, Id. 25.

² *City of Meridian v. Ragsdale*, 67 Miss. 86; 6 So. 619.

³ *Greedup v. Franklin Co.*, 30 Ark. 101; *South Platte Land Co. v. Buffalo County*, 7 Neb. 253; *Fowler v. St. Joseph*, 37 Mo. 228; *Johnson v. Milwaukee*, 40 Wis. 315; *Mobile, etc. R. Co. v. Peebles*, 47 Ala. 317.

⁴ *Minnesota Linseed Oil Co. v. Palmer*, 20 Minn. 468. That injunction will lie to restrain the collection of an illegal tax, where it creates a cloud upon title to real estate, see *Bramwell v. Guheen*, (Idaho) 29 P. 110.

the title of his property, when the party claiming under such a tax or assessment will be required to show its irregularity and the alleged irregularity or error is such that it must be disclosed by the record of the proceedings when produced, or in the course of the proofs necessary to be adduced, to show the extent and due exercise of the power to impose the tax.¹

§ 665. **Cloud upon Title.** — The illegality of the tax or fraud in levying it, coupled with the fact that it may result in a cloud being cast upon complainant's title, presents a clear case for equitable interference.² The jurisdiction to thus interfere for the prevention of a cloud upon the title resulting from an illegal tax assessment is regarded as pertaining to the well-settled powers of equity.³ Accordingly, when a statute makes a deed executed by the tax-receiver "presumptive evidence that the sale, and all proceedings prior thereto," were regular, and authorizes any one interested in the assessed property to sue to restrain a sale, an action may be brought to set aside an assessment, and restrain a sale thereunder, though the assessment is void, as such sale would create a cloud on plaintiff's title.⁴

§ 666. **Avoidance of Multiplicity of Suits.** — Where fraud or illegality on the part of those charged with making the assessment or collecting the tax is found to exist, the prevention of a multiplicity of suits may constitute an additional reason for granting relief, as where many persons are similarly affected by the illegal or fraudulent assessment; and the entire question at issue interests all equally so that an adjudication upon the matter

¹ *Cravier v. New York*, 12 Abb. (N. Y.) Pr. n. s. 340.

² *Palmer v. Rich*, 12 Mich. 414; *Heywood v. Buffalo*, 14 N. Y. 534; *South Platte Land Co. v. Buffalo Co.*, 7 Neb. 253; *Minn. Linseed Oil Co. v. Palmer*, 20 Minn. 468; *Mitchell v. Milwaukee*, 18 Wis. 92; *Jersey City v. Morris Canal Co.*, 12 N. J. Eq. (1 Beas.) 227; *Huntington v. Central Pacific R. Co.*, 2 Sawy. (U. S.) 503; *Greedup v. Franklin Co.*, 30 Ark. 101; *Mobile, etc. R. Co. v. Peebles*, 47 Ala. 317; *Milwaukee Iron Co. v. Hubbard*, 29 Wis. 51; *Leslie v. St. Louis*, 47 Mo. 474; *Hanlon v. Westchester*, 8 Abb. Pr. (N. Y.) n. s. 261; *Fowler v. St. Joseph*, 37 Mo. 228; *Johnson v. Milwaukee*, 40 Wis. 315; *McPike v. Pen*, 51 Mo. 63; *Johnson v. Hahn*, 4 Neb. 377; *Lockwood v. St. Louis*, 24 Mo. 20; *McCormick v. District of Columbia*, 4 Mackey (D. C.), 396.

³ *Bonton v. Brooklyn*, 15 Barb. (N. Y.) 375; *Curtis v. East Saginaw*, 35 Mich. 508; *Dean v. Madison*, 9 Wis. 402; *Van Dorn v. New York*, 9 Paige (N. Y.), 388; *Wiggin v. New York*, 9 Paige (N. Y.), 17; *Kerr v. Woolley*, (Utah) 24 P. 831; *Van Rensselaer v. Kidd*, 4 Barb. (N. Y.) 17; *Harkness v. Board of Public Works*, 1 McArthur (D. C.), 121.

⁴ *Coxe v. Town*, 56 Hun, 648; 10 N. Y. S. 73.

before the court will probably settle the whole question of common interest.¹ But neither for mere irregularity or error on the part of the assessor in describing in the assessment roll the property charged, nor in any case where independent grounds for equitable relief are absent, will the prevention of a multiplicity of suits alone constitute sufficient ground for an injunction.²

§ 667. **Municipal Taxes.**—In general it may be said that the same principles apply, or at least should apply, to cases where an injunction is sought against the enforcement of taxes laid by municipal corporations proper, as to state and county taxes. But it would seem from the authorities that the courts have been somewhat more liberal in granting relief against municipalities than in other cases. This disposition is no doubt attributable mainly to the trust relation which is recognized to exist between municipal officers and tax-payers. The enlarged jurisdiction in municipal cases “perhaps owes its origin as much to an idea that municipal officers, in the authority which affects the property of the people, are exercising a trust over which equity may properly assume a supervision as to any supposed fraud, actual or constructive, which may be involved in their illegal actions.”³ But most of the cases involving municipal taxes rest upon principles which apply to illegal and fraudulent taxation generally; and a petition states a cause of action which alleges that an assessment has been laid and attempt is being made to levy taxes on property of plaintiffs residing within the limits of a “pretended corporation, and that no ordinance of said pretended corporation was ever passed authorizing the levy and collection of such taxes.”⁴

¹ *Hannewinkle v. Georgetown*, 15 Wall. (U. S.) 547; *Cooley on Taxation*, 542; 2 *Dillon, Mun. Corp.* sec. 923; *Clee v. Sanders*, 74 Mich. 692; 42 N. W. 154; *Pettit v. Duke*, (Utah) 37 P. 568. See also *Lake Erie & W. R. Co. v. Young*, 135 Ind. 426; *Pollock v. Farmers' Loan & Trust Co.*, 15 S. Ct. 673; 157 U. S. 429.

² See *George v. Dean*, 47 Tex. 73; *Labadie v. Dean*, Id. 90.

³ *Cooley on Taxation*, p. 539.

⁴ *Winkler v. Halstead*, 36 Mo. App. 25. There was no abuse of discretion in denying an injunction to restrain the collection of city taxes imposed under an ordinance, where complaint was made of the non-enforcement of the ordinance against other property than that of plaintiff, but the validity of the ordinance was not impeached, nor was there any tender of any part of the unpaid tax assessed. *Augusta Factory v. City Council of Augusta*, 88 Ga. 734; 10 S. E. 859.

§ 668. **Same — Railroad Aid Taxes; Parties.** — Where taxpayers seek to enjoin township trustees from certifying that the condition authorizing the issue of township bonds in aid of a railroad have been complied with, and to enjoin the county treasurer from attempting to collect a tax voted in the premises, the trustees and treasurer, as well as the railroad company and a party to whom the company has assigned its interest in the tax, are necessary parties defendant.¹ But in an action to restrain the collection of a tax to pay railroad bonds, a preliminary order to restrain the owner from disposing of them is properly refused where the bill alleges that the railroad has not performed the conditions, that the bonds were issued fraudulently and in violation of an injunction, that the owner is not a *bona fide* holder, and has fraudulently compromised his claim with the town officers, and defendant denies everything, and alleges that he purchased from a *bona fide* holder, that the railroad has complied with the conditions, and that the compromise was in good faith, affidavits being filed on both sides.²

§ 669. **Disregard of Option to work out Tax.** — Though an injunction to restrain proceedings at law will not be granted where the plaintiff's right is doubtful, nor where he has an adequate remedy at law, yet where no notice or opportunity has been given by the supervisors to non-residents to work out their road taxes, by themselves or their tenants, an injunction will be granted to restrain the collection of the tax by suit.³ But the fact that the tax-payer has not been notified to work out that part of the road tax which might be paid in work will not authorize the restraining the collection of the entire tax.⁴

§ 670. **When not granted prior to making Levy.** — An injunction to restrain town supervisors from issuing road orders, or incurring any expenses in anticipation of the levy and collection of a tax voted for by the electors for highway purposes, in excess

¹ Sully v. Drennan, 113 U. S. 287.

² Verbeck v. Scott, 71 Wis. 59; 36 N. W. 600. Where the proceedings of the county commissioners do not show any formal order granting the prayer of a petition for a railroad aid tax, or levying the tax, the insertion of such tax in the list of taxes assessed against a township which has voted for such petition is sufficient to show the levy of the tax. Hill v. Probst, 120 Ind. 528; 22 N. E. 664.

³ Miller v. Gorman, 38 Pa. St. 309.

⁴ Sioux City, etc. R. R. Co. v. County of Osceola, 45 Iowa, 168.

of the limit fixed by law, will not be granted at the instance of the tax-payers. They would have an adequate remedy, if compelled to pay such taxes under protest, by action at law to recover them, or, if they should be extended against real estate, by suit in equity to remove the supposed lien and cloud from their title.¹ But where in an action by tax-payers of a town to restrain the county board of supervisors from levying a tax for the purpose of paying railroad aid bonds of the town, issued under authority of acts of the legislature, the complaint set forth that plaintiffs were tax-payers and assessed upon property in said town, but did not allege that they were liable to be taxed under the legislative acts mentioned, or that they had any right or interest peculiar to themselves and not common to all the inhabitants of the town, it was held that plaintiffs had no standing in court to maintain the action, and that their complaint set forth no equity.²

§ 671. **Prevention of Tax Sale and Deed thereunder.** — An injunction will lie at the suit of the owner of land, to prevent the county auditor from advertising it for sale, and the county treasurer from selling it, for the payment of delinquent taxes thereon, while said owner also owns leviable personal property within the county, sufficient to pay said taxes.³ But where the land had been illegally sold for the taxes of a previous year which had been paid by the owner, and the purchaser paid taxes for the three subsequent years, and received a deed which was afterwards set aside, and the money refunded, and the taxes for said three years were again assessed against the land, but were not paid by the owner, an injunction should not be granted to restrain the issuance of a deed to a purchaser of the land for said taxes.⁴ The record is in such case ample protection to the owner of the land, and the proceeding is a nullity casting no cloud upon his title. Nor will equity interfere by injunction to restrain the issue of a tax-deed upon the sale of a plaintiff's land, to pay a special assessment against it for improvement for which he had signed a petition with others, he not having made any objection to the action of the council in accordance

¹ *Sage v. Town of Fifield*, 68 Wis. 546; 32 N. W. 629.

² *Comins v. Supervisors, etc.*, 3 Thomp. & C. (N. Y.) 296.

³ *Abbott v. Edgerton*, 53 Ind. 196.

⁴ *Dudley v. Gilmore*, 35 Kan. 555; 11 P. 398.

with such petition until after the improvement was made, even though there were defects in the proceedings which rendered the order of the council illegal.¹

§ 672. **Same — Exempt Property.** — Equity will enjoin the collection of a tax levied upon property that is exempt from taxation, to prevent a multiplicity of suits, and to afford a complete remedy.²

§ 673. **When Tax Sale of Personalty enjoined.** — As a general rule, to entitle a party to an injunction against the sale of personalty for taxes illegally assessed, it must appear that the property is of peculiar value to the owner not computable by any ordinary rules, and that great collateral or consequential injury would thereby result to the owner from such sale.³ To this rule exceptions have often been made. Thus, where a bank, under the law, is not liable at all to taxation on its personal property, and the levy is made in such a way as to directly interfere with its business, equity will interfere by injunction, to restrain the enforcement of the tax.⁴ So where taxes have been unlawfully assessed on personalty assigned for the benefit of creditors, without allowing any opportunity to have the assessment corrected by a board of equalization, and the sheriff has seized and threatens to sell the property for such taxes, the assignees may have an injunction against such sale, it appearing that he has been charged with the inventoried price of the personalty, and that such sale would necessarily embarrass the settlement of the busi-

¹ *Sexsmith v. Smith*, 32 Wis. 299. Where assessors appointed under the Indiana act of March 11, 1867 (Act 1867, 167), providing for assessments on lands to aid in the construction of plank, etc., roads, did not list, assess, or appraise all the benefits to all the lands within one mile and a half of the beginning and end of the proposed road as located, — *held*, that an injunction would lie to prevent the collection of assessments made by such assessors. *Green Castle, etc. Co. v. Albin*, 34 Ind. 554.

² *Northern Pac. R. Co. v. Carland*, 5 Mont. 146; 3 P. 134; *Valle v. Ziegler*, 84 Mo. 214; *Paterson, etc. R. Co. v. Jersey City*, 1 Stockt. (N. J.) 434; *Mechanics' Bank v. Kansas*, 73 Mo. 555; *Ill. Cen. R. Co. v. Hodges*, 113 Ill. 323.

³ *White v. Stender*, 24 W. Va. 615; *Pac. Mail, etc. Co. v. New York*, 57 How. Pr. (N. Y.) 511; *Cooley on Taxation*, 538; 2 *Dillon on Mun. Corp.*, sec. 924; *Mobile v. Baldwin*, 57 Ala. 61; *Berri v. Patch*, 12 Cal. 299; *Baldwin v. Tucker*, 16 Fla. 258; *Hagenbuch v. Howard*, 34 Mich. 1; *Clark v. Ganz*, 21 Minn. 387; *Wells v. Dayton*, 11 Nev. 161; *Worth v. Fayetteville*, 2 Winst. (N. C.) Eq. 70; *Guimney v. Stockbridge*, 33 Wis. 505; *Union Pac. R. Co. v. Lincoln Co.*, 2 Dill. (U. S.) 279; *Lockwood v. St. Louis*, 24 Mo. 20.

⁴ *Lenawee Co. Sav. Bank v. City of Adrian*, 66 Mich. 273; 33 N. W. 304.

ness pertaining to the trust.¹ And where the collector of taxes levies upon the property of one for the taxes of another, and the collector is insolvent, and not able to respond in damages, a court of equity will enjoin the sale of such property. The object sought, in such a case, is not to wholly restrain the collection of a tax, but to restrain the sale of a particular article of property, because it is not subject to the tax.² But where personal property is subject to assessment and taxation, and the taxing officers have jurisdiction over it, but the assessment thereof is excessive, no injunction will lie until the amount of taxes, upon a reasonable and fair valuation of the property, is paid or tendered.³

§ 674. **General Result of Authorities — Relief under Peculiar Circumstances.** — From all that has preceded, the general principle is inferable that the question of taxation is one of power, and the exercise of it is vested in the law-making department of the government, and when that department has exercised its judgment in relation to the assessment of taxes, the courts have no power to interfere on the ground that the tax is unfair or unjust, unless the fundamental law of the land has been violated.⁴ The exceptions to this rule are generally capable of being classed under some recognized head of equitable jurisdiction; but usually the equity arises from facts so peculiar in themselves as to render the case one not susceptible of alignment with others. Thus, it was held that a court of equity will enjoin the sale of

¹ Dawson v. Croisan, 18 Or. 431; 23 P. 257.

² Deming v. James, 72 Ill. 78. Injunction to restrain a county treasurer and his successors from collecting a certain tax for any and all future years, cannot be granted upon a bill in which the county treasurer is the only defendant, and which only complains of the tax for a single year; not even if the bill contains a prayer for other and further relief. Beach v. Shoemaker, 18 Kan. 147.

³ Wilson v. Longendyke, 32 Kan. 267; 4 P. 361.

⁴ Linton v. Mayor, etc. of Athens, 53 Ga. 588. A court of equity will not restrain the collection of a tax on the mere showing that the tax proceedings are irregular or void, but it must also appear that they are inequitable, and that it would be against conscience to let them go on. And a town having authority, under Rev. St. § 538, to raise a gross sum for school purposes by taxation, a failure of the town meeting to take a separate vote as required on the different items constituting the gross sum, though it may make the subsequent tax to raise such sum void at law, will not make the tax inequitable, so as to warrant equitable interference by injunction against its collection. Hixon v. Oneida County, (Wis.) 52 N. W. 445.

a manufacturing company's property for taxes when it appears that while a former suit in chancery was pending between the tax-collector and the company, respecting the amount of taxes which the company was liable to pay, an act of the legislature was passed, at the instance of the company, providing for an adjustment or arbitration of the matters in dispute; that the company complied with the terms of the act; and that, in consequence of the tax-collector's refusal to abide by the arbitration, as the act required him to do, the chancellor's decree was affirmed on error against the company.¹ And sometimes, though other facts exist warranting the relief, the fact that the invalid tax is so covered up in the assessment roll as not to show its identity, may constitute an additional reason for equitable interference.²

¹ Tallahassee Manuf. Co. v. Glenn, 50 Ala. 489.

² Clee v. Sanders, 74 Mich. 692; 42 N. W. 154.

CHAPTER XVI.

PERTAINING TO MUNICIPAL CORPORATIONS.

I. GENERAL PRINCIPLES AND LIMITATIONS.

II. ILLUSTRATIONS.

A. In Actions to restrain Wrongs to Public.

B. In Actions to restrain Wrongs specially injurious to Individuals.

I. GENERAL PRINCIPLES AND LIMITATIONS.

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| <p>§ 675. Introductory Suggestions.</p> <p>676. Jurisdiction based on Trust Relation.</p> <p>677. Same — Irreparable Injury and Multiplicity of Suits.</p> <p>678. Tax-payer's Interest entitling him to sue.</p> <p>679. Non-resident Tax-payers may sue.</p> <p>680. Where Interest of Tax-payer insufficient.</p> <p>681. Diligence in seeking Relief — Acquiescence — Laches.</p> <p>682. Same — Additional Illustrations.</p> <p>683. Action by Holder of Municipal Indebtedness.</p> <p>684. The Doctrine of <i>ultra vires</i> herein.</p> <p>685. Action by Corporation.</p> <p>686. Action by State.</p> <p>687. No Interference with Discretionary Powers.</p> | <p>§ 688. Same — Legislative Powers.</p> <p>689. Same — With reference to Public Improvements.</p> <p>690. Same — Street Improvements.</p> <p>691. Exercise of Police Powers not interfered with.</p> <p>692. No Interference in Political Matters.</p> <p>693. Not granted where Injury remote and contingent.</p> <p>694. Not granted where Relief can be obtained at Law.</p> <p>695. Same — <i>Quo warranto</i>; Specific Performance.</p> <p>696. Disputed Legal Rights.</p> <p>697. Considerations of Public Convenience.</p> <p>698. Principles generally applicable.</p> |
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§ 675. *Introductory Suggestions.* — Nowhere is it so important to keep constantly in view the fundamental principles governing courts in granting and refusing the relief as under this head; without this the decisions are on some points irreconcilable, and frequently unaccountable. The absence or inadequacy of legal remedies, and the presence or imminency of irreparable injury, are the only tenable grounds for equitable interference herein, notwithstanding that in many decisions these important landmarks of jurisdiction appear to have been lost to view. For though the avoidance of a multiplicity of suits be an element of

the evil to be provided against by granting an injunction at the suit of an individual tax-payer, it cannot be recognized as a matter of additional merit in his claim to relief against an abuse of the trust confided in a municipal corporation. It is rather a consideration of public convenience, it being desirable to have the rights of all persons similarly affected as the immediate complainant settled in a single action. Keeping in view irreparable injury as the true basis of relief, there is no material difference in the merits of an application for relief against a fraudulent or *ultra vires* disbursement of public funds from which an individual suffers in common with others, and a case where relief is sought against an injury which is special and peculiar to the complainant. But if we refer the exercise of jurisdiction to the trust relation between the corporation and the inhabitants within its territorial limits, it is obvious that the jurisdiction could not extend to individual injuries such as result from opening streets, laying sewers on private premises, disturbing easements, and the like. In reality there is in the case of illegal and fraudulent diversion of public funds a double basis of jurisdiction; the threatened breach of trust, and the infliction of irreparable injury.

§ 676. **Jurisdiction based on Trust Relation.** — A municipality is considered to hold a similar relation to the citizens and taxpayers within its boundaries as that held by a private corporation to its members; that is, it occupies the relation of a trustee. As agents and trustees, those for the time occupying municipal offices may be called to account in equity by various actions, and restrained by injunction from all breaches of trust and abuses of power.¹ But an injunction will not be granted against a municipal corporation on account of its trust relation unless its officers be clearly acting in excess of the powers conferred by law;² or ex-

¹ *Milhau v. Sharp*, 15 Barb. (N. Y.) 193.

² *Sherlock v. Winnetka*, 59 Ill. 389; s. c. 68 Ill. 530; *Brown v. Concord*, 56 N. H. 375; *Patton v. Stephens*, 14 Bush (Ky.), 324; *Hill v. Kensington*, 1 Pars. (Pa.) 501; *West Phila. R. Co. v. Perkins*, 4 Brewst. (Pa.) 173; *Little v. Harrisburgh*, 4 Leg. Opin. (Pa.) 431; *Roberts v. New York*, 5 Abb. (N. Y.) Pr. 41; *Agricultural Joint Stock Co. v. Barr*, 55 Ind. 30; *Dent v. Cook*, 45 Ga. 323; *Perry v. Kinnear*, 42 Ill. 160. See also *English v. Smock*, 34 Ind. 115; *Beauchamp v. Board of Supervisors*, 45 Ill. 274; *Schumm v. Seymour*, 9 C. E. Green (N. J.), 143. Under Iowa Code, 464, providing that a city council may authorize the laying down of tracks for railroads on all streets, — *held*, that equity could not restrain a company from laying its track,

ceeding the territorial limits of its authority and attempting to exercise jurisdiction in territory over which it has not been given jurisdiction;¹ or violating a statute;² or unlawfully attempting to dispose of its property, to the injury of tax-payers;³ or threatening to issue and put in circulation illegal and void or fraudulent evidences of public indebtedness.⁴

§ 677. **Same — Irreparable Injury and Multiplicity of Suits.** — The jurisdiction to enjoin municipal corporations at the suit of individual citizens and tax-payers to prevent irreparable mischief and multiplicity of suits is well established.⁵ A frequent and most meritorious ground for interference is where public funds are about to be diverted to illegal and unauthorized purposes; and it may be stated without qualification that courts of equity will interfere at the suit of tax-payers in every such case, both on the ground of preventing a breach of trust, and to protect complainants from an injury for which, if any remedy whatever is provided by action at law, it is inadequate to meet the necessities and exigencies of the case.⁶ Two things must therefore be made apparent to the court in order to warrant relief by injunction. First, that the act is an excess of the legal authority conferred upon the

no matter how great the damage. *Heath v. Des Moines & St. Louis Ry. Co.*, 61 Iowa, 11. Equity has no jurisdiction of a bill alleging that after the fixing of a street grade, the city so constructed a sewer as to put the complainant, a property owner, to expense in raising his lots, and praying that the collection of a special tax assessed against the lots for the expense of the sewer may be enjoined. *Robison v. Milwaukee*, 61 Wis. 585. The complaint in an action to restrain municipal officers from issuing bonds should expressly aver that they are such officers. *Pierce v. Wright*, 6 Lans. 306.

¹ *Pittsburgh's Appeal*, 79 Pa. St. 317.

² *Cummings v. Shable*, 1 Phila. (Pa.) 492; *Long v. Duckinson*, 31 Leg. Int. (Pa.) 36.

³ *Brockman v. City of Creston*, 79 Iowa, 587; 44 N. W. 822.

⁴ *Lawson v. Snellen*, 38 Wis. 288; *City of Madison v. Smith*, 83 Ind. 502.

⁵ *Christopher v. Mayor*, 13 Barb. 667; *Dudley v. Trustees*, 12 B. Mon. 610; *Smith v. Appleton*, 19 Wis. 468; *Lutes v. Briggs*, 5 Hun, 67; *Milhau v. Sharp*, 15 Barb. 193; *City of Chicago v. Ferris Wheel Co.*, 60 Ill. App. 384; *Coast Co. v. Borough of Spring Lake*, (N. J. Ch.) 36 A. 21; *Ludlow & C. Coal Co. v. City of Ludlow*, (Ky.) 43 S. W. 485; *Wade v. Nunnally*, (Tex. Civ. App.) 46 S. W. 668.

⁶ *Lutes v. Briggs*, 5 Hun, 67; *Rothrock v. Carr*, 55 Ind. 334; *Patton v. Stephens*, 14 Bush, 824; *Hudson v. Mayor*, 64 Ga. 286; *Perry v. Kinnear*, 42 Ill. 160; *Austin v. Coggeshall*, 12 R. I. 329; *Jacksonport v. Watson*, 33 Ark. 704; *Sherlock v. Village of Winnetka*, 59 Ill. 389; *Brown v. Concord*, 56 N. H. 375; *Crampton v. Zabriskie*, 101 U. S. 601; *White v. Commissioners*, 13 Or. 317; *Delano Land Company's Appeal*, 103 Pa. St. 347; *Hospers v. Wyatt*, 63 Iowa, 254; *Colton v. Hanchett*, 13 Ill. 615; *Peter v. Prettyman*, 62 Md. 566.

municipal body; second, that its consequences if not prevented will result in an increase of taxation, thus imposing an additional burden upon individual tax-payers, or otherwise inflict irreparable injury, or lead to numerous actions or proceedings to correct the wrong. In the case of acts resulting in additional taxation, an important reason for interfering consists in the fact that a more speedy and efficacious remedy is required than that afforded by the tardy action of courts of law. But the increase of taxation, or of public indebtedness alone, does not warrant the relief. It must be connected with some recognized ground for equitable interference.¹

§ 678. **Tax-payer's Interest entitling him to sue.** — Any tax-payer is a proper party plaintiff in an action to enjoin an illegal appropriation of corporate funds by a municipal corporation, or the illegal creation of a corporate debt.² So any resident tax-payer may have enjoined the making of subscriptions to railroads, and the issue of bonds and other evidences of indebtedness, without legal authority or without compliance with statutory provisions.³ Indeed, it may be stated as a general rule that where an act is unauthorized by law, in other words is *ultra vires*, and calculated to impose additional burdens upon tax-payers, the latter may maintain injunction for its prevention.⁴ Whether or not the danger of loss to the public treasury, and the consequent charge upon tax-payers, constitutes irreparable injury within the general rule requiring it to be shown, seems immaterial. The demoralization

¹ *Town of St. Lawrence v. Gross*, (S. D.) 81 N. W. 640. See also *Blondell v. Gas Co.*, 89 Md. 732; *Wehmer v. Fokenga*, 57 Neb. 510.

² *McCoy v. Briant*, 53 Cal. 247; *Merrill v. Plainfield*, 45 N. H. 126; *Wilmington v. Harvard*, 8 Cuth. (Mass.) 66; *Baltimore v. Gill*, 31 Md. 875; *New London v. Brainard*, 22 Conn. 552; *Howell v. Peoria*, 90 Ill. 104; *Grant v. Davenport*, 36 Iowa, 396; *Smith v. Magourich*, 44 Ga. 163. But see *Roosevelt v. Draper*, 23 N. Y. 318; *Doolittle v. Broome Co.*, 18 N. Y. 155. Compare *Jones v. Little Rock*, 25 Ark. 301.

³ *State v. Sabine Co. Court*, 51 Mo. 850; *Springfield v. Edwards*, 84 Ill. 626; *Chestnutwood v. Hood*, 68 Ill. 132; *Bound v. Wis., etc. R. Co.*, 45 Wis. 543. See also *Jackson Co. v. Brush*, 77 Ill. 59; *Curtenius v. Hoyt*, 37 Mich. 583; *McPike v. Pen*, 51 Mo. 63; *Allen v. Jay*, 60 Me. 124; *Missouri River, etc. R. Co. v. Miami Co.*, 12 Kan. 230; *List v. Wheeling*, 7 W. Va. 501; *Allison v. Louisville, etc. R. Co.*, 9 Bush (Ky.), 247; *Delaware Co. v. McClintock*, 51 Ind. 325. The state is not a necessary and generally not a proper party. *Sherman v. Carr*, 8 R. I. 431; *Newmeyer v. Missouri, etc. R. Co.*, 52 Mo. 81; s. c. 14 Am. Rep. 394.

⁴ *Christopher v. Mayor*, 13 Barb. 567; *Mooney v. Clark*, (Conn.) 37 A. 506; 69 Conn. 241; *New Orleans, etc. R. R. Co. v. Dunn*, 51 Ala. 128; *Davenport v. Kleinschmidt*, 6 Mont. 502; *Hays v. Jones*, 27 Ohio St. 218.

in public administration of municipal affairs, if no such right of interference were recognized, ought to justify an exception based upon considerations of public welfare.¹ A tax-payer can sue to enjoin a municipal corporation from appropriating money for a purpose not authorized by its charter, although his tax would be increased thereby only a mere trifling amount; and his private purpose in bringing the suit is immaterial. Nor does the fact that one has paid a tax imposed for an illegal purpose estop him from seeking to enjoin other appropriations for the same purpose.² But in an action by one property holder, suing for himself and others similarly interested, to annul an illegal assessment, where no other person becomes a party, it is error to enjoin the collection of an assessment against the property of any other person than the plaintiff.³ The authorities are not, however, entirely harmonious in support of all the foregoing propositions; and it

¹ See *Mayor v. Gill*, 31 Md. 375; *Crampton v. Zabriskie*, 101 U. S. 601; *City of Springfield v. Edwards*, 84 Ill. 626; *Peter v. Prettyman*, 62 Md. 566; *Matthis v. Town of Cameron*, 62 Mo. 504; *Warren Co. Agricultural Joint Stock Company v. Barr*, 55 Ind. 30; *Harney v. Indianapolis R. Co.*, 32 Ind. 244; *Sinclair v. Commissioners of Winona Co.*, 28 Minn. 404; *Winston v. Tennessee, etc. R. R. Co.*, 1 Baxter, 60; *Pittsburgh's Appeal*, 79 Pa. St. 317; *Wagner v. Meety*, 69 Mo. 150; *Dent v. Cook*, 45 Ga. 323; *Davenport v. Kleinschmidt*, 6 Mont. 502; *Willard v. Comstock*, 58 Wis. 565. In an action to enjoin a city from paying for lighting by electricity, a statement in the petition that plaintiff is a tax-payer on property subject to assessment, under an ordinance providing for such expenditure out of the general fund, instead of by special taxation on property benefited, is a sufficient averment of injury to entitle plaintiff to maintain his action, if the grounds thereof are well founded. *Hanson v. Wm. A. Hunter Electric Light Co.*, (Iowa) 48 N. W. 1005. The reasoning in favor of allowing individual tax-payers to sue in such cases is thus expressed by the court in *Havery v. Indianapolis R. Co.*, 32 Ind. 442: "We cannot regard this question as open to further discussion in this court. It has been a common remedy in this state, and has been sanctioned by repeated judgments here. *Lafayette v. Cox*, 5 Ind. 38; *Oliver v. Keightley*, 24 Ind. 514. It has been sanctioned elsewhere. *New London v. Brainard*, 22 Conn. 552. It is sanctioned by established principles, acted upon and recognized elsewhere. The citizen may not be able to protect himself in any other way. If this is not his remedy, he has none. The money drawn from him by taxation may be squandered by unlawful donations to forward all manner of visionary schemes; other contributions may be wrung from him from year to year, and wasted in the same way, in defiance of laws carefully framed for his protection, and he would nevertheless be helpless. A more proper case for injunction cannot be well conceived than that in which a tax-payer seeks to protect from lawless waste a public fund, which, when dissipated thus, the law will with strong hand compel him to replenish."

² *City of Rock Island v. Huesing*, 25 Ill. App. 600; reversed 21 N. E. 558; 128 Ill. 465.

³ *Knell v. City of Buffalo*, 7 N. Y. S. 233.

was held in a recent New York case that a tax-payer cannot maintain an action to annul the acts of the legislature and of the municipal authorities granting to a corporation the right to construct street railroads, and to enjoin the municipal officials and the corporation from proceeding further in the construction of the railroad, when it is not shown that fraud existed, or that such acts would result in a waste of, or injury to, public property of the municipality.¹

§ 679. **Non-resident Tax-payers may sue.** — Relief against illegally issuing bonds or otherwise aiding private enterprises is not confined to resident tax-payers and municipal corporations to be affected thereby. Non-residents, even aliens, having taxable property to be affected by the public charge thus created may enjoin the illegal assumption or exercise of the power.²

§ 680. **Where Interest of Tax-payer insufficient.** — Tax-payers generally have not sufficient interest in the removal and relocation of a market place by city authorities to warrant an injunction upon their application, whatsoever the rights in this respect of adjacent property owners.³ Nor has a creditor and a tax-payer any such right to interfere in the administration of a municipal corporation as to obtain the aid of the court to compel the city to collect license money and not in metropolitan police warrants as required by law; for he has no direct pecuniary interest in the question raised. Hence, on this ground, holders of warrants, who

¹ *Kittinger v. Buffalo Traction Co.*, 49 N. Y. S. 713; 25 App. Div. 329. See also *Wood v. City of Victoria*, (Tex. Civ. App.) 46 S. W. 284; *Schulz v. City of Albany*, 57 N. Y. S. 963; 27 Misc. Rep. 51.

² *Goedgen v. Supervisors*, 2 Biss. 328, holding that jurisdiction may be exercised in the United States circuit court for the relief of an alien tax-payer when the amount of taxes which would be required of complainant on account of such illegal and unauthorized bonds exceeds the sum of five hundred dollars.

³ *Gall v. Cincinnati*, 18 Ohio St. 563.

RESTRAINING ERECTION OF BUILDINGS. — *Binghamton City Charter*, tit. 9, sec. 23, provides that "the common council shall have power . . . to prescribe limits in the city within which wooden buildings shall not be constructed, removed, added to, or enlarged, without the permission of the said common council," and that the council may prescribe fines and imprisonment for violation of ordinances and resolutions made pursuant to such section. Title 3, sec. 8, provides that "violations of all ordinances and resolutions may also be restrained by the injunction order of any court having jurisdiction, and the city of Binghamton may, in its corporate name, bring actions for such injunctions." *Held*, that an action to enjoin the moving of a building in the fire limits in violation of an ordinance enacted pursuant to the city charter could not be brought by a private person, but was maintainable only by the city. *Ogden v. Welden*, (Sup.) 15 N. Y. S. 790.

are the real parties whose rights are at issue; can object to this litigation and to the application of an individual for an injunction against the city. They have good cause to oppose the institution of a proceeding prejudicial to them, at the instance of a party without interest to demand it.¹ And it has been held, contrary however to the true spirit of the general rule on this subject, that injunction did not lie to restrain removal of a school-house on application of a private citizen, unless he could show special or peculiar injury different from that suffered by the public.²

§ 681. **Diligence in seeking Relief — Acquiescence — Laches.** — It has been held that the tax-payer's laches in bringing an action to enjoin misappropriations of public funds constitutes no bar to the relief.³ But the better doctrine and that sustained by the weight of authority is that under some circumstances tax-payers may be estopped by reason of new equities arising from long delay, if acts of acquiescence with full knowledge are imputable to them.⁴ And it has been frequently held that those who allow the making of municipal improvements by which their property is immediately injured, such for instance as water works, to proceed without protest, and large expenditures to be made thereon, will be estopped from enjoining and putting a stop to the improvement.⁵ Thus it is seen that there is no doubt that in some cases tax-payers may by their acquiescence become estopped from proceeding against the municipality wherein they reside or pay taxes to restrain the acts of its officers. Yet it would be difficult to state any accepted rule by which courts are governed in refusing relief on the ground of acquiescence. But municipal officers

¹ *Louisiana National Bank v. City of New Orleans*, 27 La. An. 446.

² *Parody v. School Dist.*, 15 Neb. 514. Compare *Graves v. Jasper School Tp. of Hanson County*, (S. D.) 50 N. W. 904.

³ *Austin v. Coggeshall*, 12 R. I. 829.

⁴ See *Tash v. Adams*, 10 Cush. 252; *Fuller v. Inhabitants of Melrose*, 1 Allen (Mass.), 166; *Burlington & Missouri River R. R. Co. v. Sanders County*, 16 Neb. 123.

⁵ *Logansport v. Uhl*, 99 Ind. 531. See also *Goodin v. Cincinnati, etc. Co.*, 18 Ohio St. 169; *Bigelow v. Los Angeles*, 85 Cal. 614; 24 P. 778; *Haight v. Price*, 21 N. Y. 241; *Logansport v. La Rose*, 99 Ind. 117; *Birmingham Canal Co. v. Lloyd*, 18 Ves. Jr. 514; *Rochdale Canal Co. v. King*, 2 Sim. n. s. 78; *Blanchard v. Doering*, 23 Wis. 200; *McQuiddy v. Ware*, 20 Wall. (U. S.) 14; *Thomas v. Woodman*, 28 Kan. 217; s. c. 38 Am. Rep. 156; *Brown v. Merrick Co. Comm'rs*, 18 Neb. 355; *Bowman v. Wathen*, 42 U. S. (1 How.) 189; *Burden v. Stein*, 27 Ala. 104; *Jones v. Newark*, 3 Stock. (N. J.) 452; *Morris, etc. R. Co. v. Prudden*, 20 N. J. Eq. 530.

will not be enjoined from paying for work upon which a contractor has made large expenditures and whose performance of the contract has been accepted by the municipality and thrown open to the public, on the application of a complainant who alleges illegality in the contract, but who, having an adequate remedy at law by appeal from the action of the municipality in letting the contract, has lain by until the work was completed.¹

§ 682. **Same — Additional Illustrations.** — A tax-payer who would enjoin the erection of a public bridge by the county, must act promptly, and must not permit the contractor to expend money in good faith.² And a party may become barred by his acquiescence in street improvements, notwithstanding irregularity and even excess of authority in making them; as where one had knowingly allowed a city to take possession of his land and expend thereon a large amount of public funds in preparing it for use as a public highway. The complainant in such a case was refused an injunction to prevent the construction of a sewer over the land in question.³ Nor will a municipal corporation which has occupied a strip of land for many years as a public street be enjoined at the suit of the original proprietor of the land from going upon the land and keeping it open for street purposes, or preventing complainant from fencing it.⁴ So a right to have a city enjoined from taking water from a stream to the injury of the owner of a water-power, without first making compensation, is waived if the owner stands by and sees the city erect its works without making claim for compensation; and when afterwards the owner seeks an injunction, it will be refused him, and he will be left to his legal remedies.⁵ There can be no laches, however, where a tax-payer seeks to enjoin the payment of county bonds which have been illegally issued and are void.⁶ But a tax-payer who has participated in issuing bonds is estopped from maintaining an action to enjoin taxation for their payment.⁷

§ 683. **Action by Holder of Municipal Indebtedness.** — The mere

¹ *Clark v. Dayton*, 6 Neb. 192.

² *Brown v. Merrick Co. Comm'rs*, 18 Neb. 355. See also *Bigelow v. Los Angeles*, 85 Cal. 614; 24 P. 778.

³ *Trepnagen v. Mayor*, 29 N. J. Eq. 206.

⁴ *City of Chicago v. Wright*, 69 Ill. 818.

⁵ *Logansport v. Uhl*, 99 Ind. 531; s. c. 50 Am. Rep. 109.

⁶ *Dent v. Cook*, 45 Ga. 323.

⁷ *Young v. Campbell*, 75 N. Y. 525.

holder of evidences of current county indebtedness, a county order for instance, has no such interest, before recovery of judgment on his claim and execution thereon returned *nulla bona*, as will entitle him to an injunction to restrain municipal authorities from controlling and disposing of the property of the municipality as they see fit.¹ It is otherwise where city bonds have been issued under a statute which authorizes their issue and further provides that thereafter no bonds shall be issued by the city except for the payment of its indebtedness. In such case the latter provision becomes a part of the contract with the holders of the first bonds, and they may have enjoined the city authorities from issuing other bonds, though in pursuance of a subsequent statute.² And a creditor of a municipal corporation will be granted an injunction against its officers as an adjunct to a remedy to enforce his debt.³

§ 684. **The Doctrine of ultra vires herein.** — There is nothing peculiar in the doctrine of *ultra vires* as applied to municipal corporations in this connection; nor is there anything different from its application in the case of private corporations, it being in both cases a well-established rule that equity will enjoin all acts injurious to those for whom the trust is held and exercised, and which are in excess of legal duty and authority imposed and conferred in connection with such trust. This principle was early established, and an almost unlimited number of adjudications serve to illustrate it.⁴ And where action being taken or about to

¹ *Montague v. Horton*, 12 Wis. 599.

² *Smith v. Appleton*, 19 Wis. 468.

³ *Droz v. East Baton Rouge Parish*, 36 La. An. 307.

⁴ See *Bayle v. New Orleans*, (La.) 8 Am. & Eng. Corp. Cas. 829; *Henderson v. Covington*, 14 Bush (Ky.), 312; *Gifford v. N. J. R. Co.*, 10 N. J. Eq. 171; *Crampton v. Zabriskie*, 101 U. S. 601; *Baltimore v. Gill*, 31 Md. 375; *Wade v. Richmond*, 18 Grat. (Va.) 583; *Stevens v. Railroad Co.*, 29 Vt. 549; *Caruthers v. Harnett*, 67 Tex. 127; 2 S. W. 523; *Page v. Allen*, 58 Pa. St. 338; *Terrett v. Sharon*, 34 Conn. 105; *Normand v. Otoe Co.*, 8 Neb. 18; *Merrill v. Plainfield*, 45 N. H. 126; *Oliver v. Keightley*, 24 Ind. 514; *Grant v. Davenport*, 36 Iowa, 396; *Drake v. Phillips*, 40 Ill. 388; *Douglass v. Placerville*, 18 Cal. 643; *Hooper v. Ely*, 46 Mo. 505; *Patterson v. Bowes*, 4 Grant (Can.), 170; *West Gwillimbury v. Hamilton R. Co.*, 23 Grant (Can.), 383; *New London v. Brainard*, 22 Conn. 553; *Booth v. Woodward*, 5 Am. L. R. n. s. 202; *Clafin v. Hopkins*, 4 Gray (Mass.), 502; *Stetson v. Kempton*, 13 Mass. 272; *Murphy v. Jacksonville*, 18 Fla. 318; *Grant Co. v. Bradford*, 72 Ind. 455; *Bergner v. Harrisburg*, (Com. Pleas, Dauphin Co.) 1 Parson (Pa.), 291; *Cornell v. Guilford*, 1 Den. (N. Y.) 510; 1 Dill. Corp. secs. 52 *et seq.*; *New London v. Brainard*, 22 Conn. 552; *Hood v. Lynn*, 1 Allen (Mass.), 103; *Hen-*

be taken by the authorities of a municipality is clearly illegal, and where the necessary result of such action will be the imposition of a burden upon the property of a citizen and tax-payer, a court of equity will, on application of the latter, interpose by injunction to restrain such municipal corporation,¹ or to restrain it from any other abuse of its corporate powers, which would have a similar result.² Any expenditure which is not made to accomplish a legitimate municipal object may be enjoined. Thus, where the New Orleans city council appropriated money to pay its expenses in escorting the liberty bell back to Philadelphia, it was held that an injunction would issue on petition of a tax-payer, against the city, its treasurer, and comptroller.³ And persons doing business on a street who are householders thereon may enjoin municipal authorities from changing the name of the street, where they allege that serious injury would result to them from such change, the city having no statutory authority for making it.⁴ But it has

derson v. Covington, 14 Bush (Ky.), 312; Hodges v. Buffalo, 2 Den. (N. Y.) 110; Halstead v. New York, 3 N. Y. 433. Where the board of commissioners are about to let a contract for the building of a bridge without authority, a court of equity will enjoin the letting at the instance of a tax-payer, in order to avoid the complication arising from the levy of an illegal tax. Fones Bros. Hardware Co. v. Erb, (Ark.) 17 S. W. 7. *Unauthorized conveyance.* — Where a city holds, for the purpose of erecting wharves thereon, real property which was acquired under a legislative act, and paid for by taxation, citizen tax-payers whose private interests are subserved by the maintenance of wharves may sue to restrain by injunction the passage of an ordinance by the city council, authorizing the mayor to convey the property to the commissioners of the sinking fund. Roberts v. City of Louisville, (Ky.) 17 S. W. 216. Among the purposes which have been held unauthorized and properly enjoined are the following: The application of the funds of a village by its common council for the purchase of lands and the erection of buildings thereon for private purposes. Sherlock v. Village of Winnetka, 68 Ill. 530. The payment of a reward for the apprehension of a defaulting city official and expenses connected with his arrest. Patton v. Stevens, 14 Bush, 324. Payment of counsel fees in proposed litigation entirely beyond the corporate authorities. Roberts v. Mayor, 5 Abb. Pr. 41. But an injunction will not be granted at the suit of a city solicitor to restrain the city from employing other counsel in a pending suit. Hugg v. Camden, 29 N. J. Eq. 6.

¹ Christopher v. New York, 13 Barb. (N. Y.) 567; Borough of Forty Fort v. Forty Fort Water Co., 9 Kulp (Pa.), 241; Hays v. Jones, 27 Ohio St. 218. Compare Linden v. Case, 46 Cal. 171.

² People v. New York, 32 Barb. (N. Y.) 102; Sylvester Coal Co. v. City of St. Louis, (Mo. Sup.) 32 S. W. 649; 130 Mo. 323; City of Austin v. Austin City Cemetery Ass'n, 28 S. W. 528; 87 Tex. 330; Deems v. City of Baltimore, (Md.) 30 A. 648; Cleveland City Ry. Co. v. City of Cleveland, 94 F. 385.

³ The Liberty Bell, 23 Fed. Rep. 843.

⁴ Anderson v. Lord Mayor, 15 L. R. Ir. 410.

been held that in such cases the proceeding should be against the municipal authorities as public officers and not against the municipality.¹

§ 685. **Action by Corporation.**—Relief is by no means confined to tax-payers, but a municipality whose funds are in the hands of public officers may enjoin their being appropriated for an illegal purpose. Thus, where the funds of a county in the hands of public officers were about to be paid over to a railroad company as interest upon bonds of the county issued without authority of law, an injunction was granted upon application of the board of county commissioners to restrain such payment.² But a county seeking an injunction must show equitable grounds; for equity will not enjoin the payment of a debt which has the sanction of a moral obligation.³ Accordingly, where a city has granted to a corporation the privilege of constructing and maintaining a street railway in the streets and alleys of the city, the grant providing that the track of the railway shall be made to conform to the established grade of the streets, but containing no provisions as to the rail which shall be used on the track, or the gauge upon which it shall be constructed, the city under its ordinary powers having the right to regulate the manner in which the track shall be constructed, equity will not interfere to restrain the street railway corporation, at the suit of the city, from constructing its line with a rail and gauge obnoxious to the city authorities.⁴ But the power of a city to prevent a dangerous and offensive nuisance is well established, and a preliminary injunction obtained by a gas company to prevent a borough from removing pipes and breaking connections will be dissolved, it being presumptively shown that the pipes are such a nuisance, in order that a final hearing may definitely establish the facts.⁵ And injunction will issue at the suit of the proper authorities of a city to restrain an alteration or change of grade of a street which will deprive the public of its convenient use.⁶

¹ *Smart v. Town of Johnston*, 24 A. 830; 17 R. I. 778. See also *Fitzpatrick v. Bromwell Brush & Wire Goods Co.*, 7 Ohio Dec. 216; 5 Ohio N. P. 165.

² *Gulf R. Co. v. Commissioners of Miami Co.*, 12 Kan. 280.

³ *County Commissioners v. Hunt*, 5 Ohio St. 488.

⁴ *City of Waterloo v. Waterloo St. R. Co.*, 71 Iowa, 198; 32 N. W. 329.

⁵ *Appeal of the Borough of Butler*, (Pa.) 1 A. 604.

⁶ *Jersey City v. Central R. Co.*, 40 N. J. 417; 2 A. 262.

protect the city as to expenditures made in good faith.¹ And to authorize a preliminary injunction to stay the proceedings of a municipal corporation on the ground of fraud, the plaintiff should be able to point out some particular act of fraud, or *prima facie* evidence of corruption, on the part of the controlling officers of the corporation.²

§ 688. **Same — Legislative Powers.** — With respect to legislative acts of municipal bodies there is some uncertainty upon the authorities as to the stage at which and the cases in which a court of equity will interfere. But it is well settled that equity will not interfere to prevent the passage of ordinances in excess of the authority to legislate conferred by the state constitution and statutes; but will wait until some act detrimental to an individual or to the public is attempted under color of authority of ordinances, when, if it is found to be unauthorized and void altogether, or in so far as it assumes to authorize the act in question, the court will then and not before enjoin the unauthorized and illegal act.³ The reason is that in the enactment of ordinances the corporation acts not as a trustee, but as a local government, exercising a portion of the supreme power of the state.⁴ An application for relief against an ordinance is not premature, however, when the property or the money of the corporation has become endangered by reason of illegal proceedings of municipal officers acting under a city ordinance which is repugnant to the

¹ *City of Richmond v. Davis*, 103 Ind. 449; 3 N. E. 130.

² *Champlin v. Corporation of New York*, 8 Paige (N. Y.), 578.

³ *Whitney v. Mayor*, 28 Barb. 233; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505; *Spring Valley Water Works v. Bartlett*, 8 Sawyer C. Ct. 555; s. c. 16 Fed. Rep. 615; *Harrison v. New Orleans*, 33 La. An. 222; s. c. 39 Am. Rep. 272; *People v. Mayor*, 10 Abb. Pr. 144; *Cincinnati S. R. Co. v. Smith*, 29 Ohio St. 291; *People v. Mayor*, 32 Barb. 35; s. c. 9 Abb. Pr. 253; *Atkinson v. Wykoff*, 58 Mo. App. 86; *Lewis v. Waterworks Co.*, 19 Colo. 236; *Stevens v. St. Mary's Training School*, (Ill. Sup.) 32 N. E. 962; *New Orleans Water Works Co. v. City of New Orleans*, 17 S. Ct. 161; 164 U. S. 471; *Carter v. City of Chicago*, 57 Ill. 283; *Mitchell v. Wiles*, 59 Ind. 364; *Mayor v. Gill*, 31 Md. 375; *State v. Superior Court of Milwaukee County*, 105 Wis. 651; 81 N. W. 1046; *Alpers v. San Francisco*, 12 Sawy. 631. See *Meredith v. Sayre*, 32 N. J. Eq. 557. That an injunction will not lie to prevent the enforcement of an alleged unlawful ordinance, even to prevent an apprehended breach of the peace and arrest, in case of a violation of the ordinance, there being adequate remedy at law, see *Wardens of St. Peter's Episcopal Church v. Town of Washington*, 109 N. C. 21; 13 S. E. 700. The contrary doctrine to that stated in the text is declared in *International Trading-Stamp Co. v. City of Memphis*, (Tenn.) 47 S. W. 136.

⁴ *Culson v. Portland, Deady*, 481.

charter and therefore void.¹ But although acts are done under the assumed authority of an ordinance which is void, an injunction will not be granted unless full and adequate redress cannot be had at law.² And injunction will not lie in favor of one claiming the exclusive privilege of laying gas mains and pipes in the streets of a city to prevent the passage of an ordinance by the city granting the privilege to others.³

§ 689. **Same — With Reference to Public Improvements.** — The rule that courts will not interfere to restrain or control the exercise of discretionary powers also has special application in cases where injunction is sought to restrain the construction of works of public improvement such as streets, sewers, bridges, and public buildings; and when such matters are by law intrusted to municipal bodies equity will not revise or control the exercise of discretionary powers as to the terms upon which or the manner in which the improvements shall be made.⁴ The general rule is that a court of equity will not assume to judge of the expediency and wisdom of laws conferring authority upon municipal officers and boards to make public improvements where the latter are acting within the scope of their legal authority, however impolitic or oppressive may be the law under which they are acting. The remedy for grievances must be sought, not in the courts, but at the hands of the legislature.⁵

§ 690. **Same — Street Improvements.** — Equity will not interfere with changes in the grade of streets which city authorities are fully authorized to make.⁶ Nor will equity interfere with

¹ *Mitchell v. Wiles*, 59 Ind. 364. See also *Mayor v. Gill*, 31 Md. 375.

² *Gartside v. East St. Louis*, 43 Ill. 47; *Torpedo Co. v. Borough of Clarendon*, 19 Fed. Rep. 231; *Murphy v. East Portland*, 12 Or. 308; compare *Verdery v. Village of Summerville*, 82 Ga. 138; 8 S. E. 213; *Mayor v. Radecke*, 49 Md. 217. Where all the provisions of an ordinance are not void, its enforcement cannot be enjoined. *Davis v. Fasig*, 128 Ind. 271; 27 N. E. 726.

³ *Montgomery Gas Light Co. v. City Council*, 87 Ala. 245; 6 So. 113.

⁴ *Inhabitants of Greenville v. Seymour*, 7 C. E. Green, 458; *Morgan v. City of Binghamton*, 102 N. Y. 500; *Goszler v. Corporation of Georgetown*, 6 Wheat. 593; *Sugar Refining Company v. Mayor*, 11 C. E. Green, 247; *Torrent v. Common Council*, 47 Mich. 115; *Bacon v. Walker*, 77 Ga. 336; *Spokane St. Ry. Co. v. City of Spokane*, 32 P. 456; 5 Wash. 684.

⁵ *Inhabitants of Greenville v. Seymour*, 7 C. E. Green, 458. See also *Sheen v. Stothart*, 29 La. An. 630, holding that the removal by municipal officers of obstructions in the streets cannot be enjoined as a trespass, it being the proper exercise of police power.

⁶ *Goszler v. Corporation of Georgetown*, 6 Wheat. 593.

lawful proceedings for vacating streets;¹ especially where the injury done to private individuals may be compensated for in damages recovered in an action at law.² A citizen and tax-payer is not entitled to such relief against the opening of a street as of right unless he can show special damage to himself independent of that suffered by the community at large.³ It is otherwise, however, where the proceedings have been conducted fraudulently, so that the outlay of public funds in payment would amount to a fraudulent diversion. In that case, any tax-payer can maintain an action for relief.⁴ But in the absence of any allegation of fraud or illegality equity will not interfere with city authorities who are made the judges of the necessity for extending and opening streets, constructing bridges, and the like.⁵ City authorities cannot however legally direct the making of street improvements by resolution merely, but the same must be by ordinance regularly adopted; and a party against whose property assessments are levied under such resolution may treat the same as a nullity and enjoin the collection of the assessment; nor does the subsequent adoption of a confirmatory ordinance validate the irregular assessment.⁶ And a city may be enjoined and restrained from establishing a grade and doing work upon a street, if the proposed grade and work would not be beneficial to the public, but would render the street impassable, and the place to which it leads inaccessible.⁷

§ 691. **Exercise of Police Powers not interfered with.** — Courts of equity carefully abstain from interposing their extraordinary

¹ *Meredith v. Sayre*, 32 N. J. Eq. 557.

² *Smith v. Weldon*, 73 Ind. 454. It is held that the opening of a street will not be enjoined after the repeal of the act under which it was opened; an injunction in such case being unnecessary. *Cohen v. Gray*, 70 Cal. 85.

³ *Heller v. Atchison, T. & S. F. R. Co.*, 28 Kan. 625. See also *City of Chicago v. Union Building Assoc.*, 102 Ill. 379; *McGee's Appeal*, 114 Pa. St. 470.

⁴ *Armstrong v. City of St. Louis*, 3 Mo. App. 151; *Carter v. City of Chicago*, 57 Ill. 283; *Robertson v. Breedlove*, 61 Tex. 316; *Conrad v. Smith*, 32 Mich. 429; *Middleton v. Greeson*, 106 Ind. 18; *Town of Covington v. Nelson*, 35 Ind. 532; *State v. Commissioners of Marion Co.*, 21 Kan. 487.

⁵ *Sugar Refining Company v. Mayor*, 11 C. E. Green, 247; *Des Moines City Ry. Co. v. City of Des Moines*, (Iowa) 58 N. W. 906; *Richardson v. City of Eureka*, 42 P. 965; 110 Cal. 441.

⁶ *Newman v. Emporia*, 32 Kan. 456; s. c. 7 Am. & Eng. Corp. Cas. 263. See *Wilson v. City of Auburn*, 27 Neb. 435; 48 N. W. 257.

⁷ *Armstrong v. St. Louis*, 3 Mo. App. 151.

process in matters coming within the proper province of municipal officers charged with the enforcement of police regulations, these matters being more properly left with courts charged with the administration of criminal laws. Thus, where the charter of a city authorizes it to make ordinances to protect itself from fire, and to establish districts within which it shall not be lawful to erect wooden buildings, an injunction against the demolition of a wooden building unlawfully erected will not lie, on the ground that the building has become real estate; nor that the building, by means of iron and tin sheeting and roofing, has become virtually fireproof.¹ So where the common council of the city was divided on the question of what day was fixed for their regular meeting, and the minority, who claimed an earlier meeting than the majority, assembled and instructed the marshal to arrest and bring in the other members, it was held that an action would not lie, at the suit of such other members, individually, to restrain the members composing the minority from meeting and acting as such, and to restrain the marshal from arresting the plaintiffs. Neither the illegality of an arrest, nor the insolvency of a person who threatens to make an arrest, is sufficient ground for issuing an injunction to restrain him from so doing.² On the same principle a provisional injunction granted to a party restraining the city from interfering with his business, of coffee-house and concert hall, and from collecting a certain license tax, was held to be no ground for refusing an injunction prayed by the city to restrain the carrying on of the business until the license-tax was paid.³

§ 692. **No Interference in Political Matters.** — The policy of non-interference with elections generally was explained in another place.⁴ The same policy prevails when the validity and results

¹ *Hine v. New Haven*, 40 Conn. 478. See also *Brockport v. Johnson*, 13 Abb. (N. Y.) N. Cas. 468; *Burnett v. Craig*, 80 Ala. 135.

KEEPING DAIRY WITHIN CITY LIMITS. — The enforcement of the ordinances of New Orleans being, by the constitution and laws of the state, vested in the recorder's court of that city, the validity of penal ordinances must be tested in that court, and on appeal therefrom, and the owner of property improved and used as a dairy cannot enjoin the enforcement by authorized judicial process of an ordinance requiring all dairies to be removed from within certain limits. *Hottinger v. City of New Orleans*, 42 La. An. 629; 8 So. 575.

² *Burch v. Cavanaugh*, 12 Abb. (N. Y.) Pr. N. s. 410.

³ *Wells v. New Orleans*, 32 La. An. 676.

⁴ *Supra*, § 680.

of a city election are sought to be called in question in a proceeding to restrain the acts of city officials and boards. And when a court of equity has assumed jurisdiction to interfere by injunction in a contested city election, where it is sought to enjoin a municipal council from canvassing the returns of a city election which the law makes it their duty to do, such prohibitory order may be disregarded and treated as a nullity for want of jurisdiction over the subject-matter.¹ Nor will the court interfere where the threatened injury complained of will be to political rights rather than property interests. And an injunction will be refused where sought against the enforcement of an ordinance on the ground that the consequence will be to deprive parties of their right to exercise the functions of public offices which they hold.² Nor should an injunction be granted against a county-site election, when the day for such election has passed; nor is an injunction the proper remedy for correcting a removal of county officers pursuant to such an election.³

§ 693. **Not granted where Injury remote and contingent.** — Where relief is sought against specific acts alleged to threaten special injury to complainant, equity will not interfere if the danger threatened be uncertain and remote; nor will it assume jurisdiction upon allegations of the mere probability of future injury to question the lawful election of officers or the validity of ordinances. The injury which will justify relief must be immediately impending and of such a character as ordinarily warrants interference. An allegation amounting only to a speculative opinion as to the consequences of enforcing a void ordinance is not sufficient. The injury must be specified and so pointed out that the court can see that it will be an inevitable consequence of the act threatened and complained

¹ *Dickey v. Reed*, 78 Ill. 261; *Bynum v. Commissioners of Burke Co.*, 101 N. C. 412. See also *Holmes v. Oldham*, 1 Hughes, 76, holding that an injunction does not lie to enjoin the holding of a municipal election on the ground that disorder and confusion may result by reason of conflict between rival bodies claiming to constitute the city government of the city.

² *Sheridan v. Colvin*, 78 Ill. 237.

³ *McKinney v. Board of Commissioners*, (Fla.) 4 So. 855, holding also that where a bill seeks to enjoin county commissioners from holding a county-site election, on the ground that a previous election, at which the site was located, precludes the calling or holding of the second election for a period defined by the statute, the bill should show that the former election was legal, or such as to preclude the second one.

of.¹ And equity will not interfere, at the suit of a tax-payer, to enjoin *ultra vires* proceedings by a city to establish a system of water-works when the city has done nothing further in that direction than to pass a resolution directing the mayor and clerk to take steps for the letting of a contract for the construction of such works. Nor is it sufficient that these officers "threaten and declare that they intend" to carry out the resolution;² and on the foregoing principles a court of equity will not enjoin, at the suit of a tax-payer, an issue of municipal bonds which when issued will be void even in the hands of innocent purchasers.³

§ 694. **Not granted where Relief can be obtained at Law.** — The existence of a remedy by action or by *ex parte* proceeding as a bar to relief by injunction is of peculiar importance under this head; and it may be remarked that where a method of legal redress has been provided, courts of equity, owing to their reluctance to interfere in the governmental affairs of political subdivisions, will not go to any great length to inquire into the question whether the legal remedy is in all respects suited to the necessity and exigency of the case presented. Courts of equity will not grant relief by injunction against municipal officers for unlawful acts, or for attempted enforcement of void ordinances, or in any case where the aggrieved party may have a full and adequate remedy at law.⁴ They will not invade the province of courts of law to grant relief by mandamus.⁵ Nor will they interfere with the proceedings of

¹ Kearney v. Andrews, 2 Stockt. (N. J.) 70; Lewis v. Denver City Water-Works Co., (Colo. Sup.) 34 P. 993. Compare Wood v. Brooklyn, 14 Barb. 425.

² Pedrick v. City of Ripon, 73 Wis. 622; 41 N. W. 705.

³ Bolton v. City of San Antonio, (Tex. Civ. App.) 21 S. W. 64.

⁴ West v. Mayor, 10 Paige, 539; Levy v. City of Shreveport, 27 La. An. 620; Burnett v. Craig, 30 Ala. 135; Cohen v. Commissioners of Goldsboro, 77 N. C. 2. See also Gartside v. East St. Louis, 43 Ill. 47; Garrison v. City of Atlanta, 68 Ga. 64; Davis v. American Society, 6 Daly, 81; Poyer v. Village of Des Plaines, 123 Ill. 111; Dodd v. City of Hartford, 25 Conn. 232; Bogg v. Detroit, 5 Mich. 336; Rockwell v. Bowers, (Iowa) 55 N. W. 1; Jackson v. City of Newark, (N. J. Ch.) 31 A. 238; Scott v. Smith, (N. C.) 28 S. E. 64; Golden v. City of Guthrie, 41 P. 350; 3 Okl. 128; Schulz v. City of Albany, 57 N. Y. S. 963; 27 Misc. Rep. 51. Nor where an action for damages will furnish redress for the act done under the assumed authority of such ordinances. David v. American Society, 6 Daly, 81. But where proceedings to vacate a highway are void for want of jurisdiction, the remedy by certiorari is not exclusive, but injunction lies to prevent the proposed vacation. Moffit v. Brainard, (Iowa) 60 N. W. 226.

⁵ Safe Dep. & Tr. Co. v. City of Anniston, 96 F. 661.

municipal bodies where the validity of the same may be tested in a proceeding by *certiorari*.¹ And where ample provision had been made by law for redressing grievances growing out of the action of county commissioners in building a court-house, an injunction to restrain their action was refused.² And the breach of a contract for which an action at law will afford redress will not furnish any ground for awarding an injunction against a municipal body alleged to be about to violate it.³ An injunction will not be granted to restrain the prosecution of suits for the violations of municipal ordinances where complainants may test their validity on appeal from the decisions of inferior courts wherein such prosecutions have occurred.⁴ So where the ground on which a party seeks relief in the court against the operation of a city ordinance would be equally effective as a defence to a suit at law for a breach of such ordinance, the court will not grant an injunction to prevent a multiplicity of suits for such breaches until the invalidity of the ordinance has been settled in a suit at law.⁵ Nor is it alone any ground for relief by injunction that an ordinance is unreasonable and oppressive, the remedy by defence at law being adequate.⁶

§ 695. **Same — Quo warranto — Specific Performance.** — In the absence of a statute conferring the right, a private citizen cannot maintain an action to enjoin those assuming to act as officers of a newly formed county from acting in an official capacity on be-

¹ *Stubenrauch v. Nevenesch*, 54 Iowa, 567.

² *Wood v. Bangs*, 1 Dak. 179. See also *Gaertner v. City of Fond du Lac*, 34 Wis. 497; *Kelsey v. King*, 32 Barb. 410.

³ *Thomas v. Supervisors*, 56 Ill. 851. See also *Windrim v. Philadelphia*, (Pa.) 1 Leg. Gaz. Rep. 311.

⁴ *Devron v. First Municipality*, 4 La. An. 11; *Levy v. City of Shreveport*, 27 La. An. 620. But in *Shinkle v. City of Covington*, 83 Ky. 420, an injunction was held properly granted to prevent a city from repeatedly prosecuting a citizen for violating a city ordinance prohibiting any person from holding possession of any streets or commons of the city, the complainant asserting title to the premises in controversy, the relief being allowed pending a determination of the disputed question of title.

RAILROAD CROSSING. — A bill will not lie to restrain a town from constructing a highway across a railroad at grade, unless it appear that the railroad company failed to take an appeal from the laying out of the highway because they believed, and had reason to believe, when the highway was laid out, that it was not to cross the railroad at grade, and so lost their right to test the question at law. *Vermont Cent. R. Co. v. Royalton*, (Vt.) 4 A. 868.

⁵ *West v. Mayor of New York*, 10 Paige (N. Y.), 539.

⁶ *Field v. Village of Western Springs*, 181 Ill. 186; 54 N. E. 929.

half of such county, on account of the illegality of the act creating such county. The proper remedy in such case is an action *quo warranto*, prosecuted in the name of the state for the usurpation of the franchise of being a body corporate and politic.¹ And notwithstanding the general practice of granting injunctions to restrain violations of contracts of which specific performance will be decreed, it seems that in the case of municipal corporations a different rule prevails, and that a party will be relegated to his remedy by independent action in equity for specific performance.² Thus, it was held that the fact that the title to a lot on which the common council of a city had determined to build a city hall was defective, afforded no ground for an injunction to restrain the building on such lot at the suit of plaintiff, who alleged that the city had contracted to erect the city hall on a lot conveyed by plaintiff to the city. His remedy was by bill for specific performance.³

§ 696. **Disputed Legal Rights.** — Where questions of legal right affecting a municipal corporation are in dispute, so as to be a source of constantly recurring annoyance and litigation, an injunction, the object of which is to restrain a city council, will not be granted, but the parties will be left to first settle the disputed questions at law.⁴ And the question whether or not a local

¹ McDonald v. Rehner, 22 Fla. 198; Hersey v. Steele, 28 Ark. 455. Compare Kerr v. Trego, 47 Pa. St. 292.

² See City of Fort Smith v. Brogan, (Ark.) 5 S. W. 337.

³ Kendall v. Frey, 74 Wis. 26; 42 N. W. 466. See also Canal & Claiborne St. R. Co. v. City of New Orleans, 39 La. 709; 2 So. 388, holding that the original grantee from the city of New Orleans of a franchise or privilege of a right of way over certain streets for railroads for a term of twenty years, cannot, after the expiration of said term, enjoin the city from advertising and selling the same franchise, on the ground that the city has failed to comply with its alleged contract obligation to take and pay for its "railroads, rolling stock, equipments, and fixtures."

⁴ Municipality No. 1 v. Municipality No. 2, 12 La. An. 49; Gaslight & Coke Co. of New Albany v. City of New Albany, (Ind. Sup.) 39 N. E. 462. Where the act sought to be restrained involves the question of right to exercise official authority, a court of equity will not interfere, it being a proper case for *quo warranto* proceedings. Brown v. Reding, 50 N. H. 336. See also District Township v. Barrett, 47 Iowa, 110; Holmes v. Jersey City, 12 N. J. Eq. (1 Beas.) 299; Cross v. Morristown, 18 N. J. Eq. 305. Where, upon an application for injunction, the right upon which the complainant's equity rests is derived from an ordinance authorizing city officers, upon certain conditions, to enter into a written contract giving the use of certain wharves and piers for a ferry, the complainant must exhibit the writing or a copy thereof with his bill, or assign a satisfactory reason for its non-production, or the injunction will be refused. Hankey v. Abrahams, 28 Md. 588.

statute which prescribes the location within which a city shall erect a city hall is in violation of the right of local self government, will not be determined in a suit by a tax-payer to restrain the common council from issuing bonds for such city hall, where the action of the common council appears to be voluntary and in the exercise of its own discretion, and not the result of coercion on the part of the legislature.¹ A village should not, ordinarily, be restrained by a temporary injunction from using water from a given source because of a controversy between the village and the corporation furnishing it. The matter should stand over until a final hearing.² Nor is a telephone company entitled to a preliminary injunction to restrain the authorities of a town from removing poles for telephone wires, when the claim on which the right is founded is, as a matter of law, unsettled.³

§ 697. **Considerations of Public Convenience.** — Equity will sometimes decline to interfere upon considerations of public interest, especially where the legal questions are doubtful. Thus, when it is sought to enjoin the erection of public building by a municipality, and the effect would be to arrest a great public improvement after a large expenditure of money, equity will decline to interfere except in case of a clear abuse of authority.⁴ So where it appeared that a county had no court-house, and there was no place at the county seat that could be procured for that purpose that the commissioners advertised for bids for building a court-house, and awarded the contract at a certain sum, to be paid in county warrants then worth, in part, no more than fifty cents on the dollar, and that the sum bid if paid in cash would have been but a fair price for the building erected; it was held, that assuming that the commissioners exceeded their authority, and that the contract was void because the question had not been submitted to a vote of the electors, it would be inequitable to enjoin the issue or payment of the warrants.⁵ And an injunction will not be

¹ *Carlisle v. City of Saginaw*, 84 Mich. 134; 47 N. W. 444. See also *Marvin Safe Co. v. New York*, 38 Hun (N. Y.), 146.

² *West Troy Water Works v. Green Island*, 32 Hun (N. Y.), 530.

³ *New York & N. J. Telephone Co. v. East Orange Tp.*, 46 N. J. Eq. 490; 8 A. 289.

⁴ *Wheeler v. Rice*, 83 Pa. St. 232. See also *Moore v. Atlanta*, 70 Ga. 611, holding that extensive city improvements should not be stopped by injunction by a landowner damaged by change of a street grade. *Christian v. City of St. Louis*, (Mo. Sup.) 29 S. W. 996.

⁵ *Wood v. Banga*, 46 N. W. 586; 1 Dak. 179. Whether pending a proceed-

granted to cut off the entire water supply of a large city on the ground of plaintiffs' superior right to the waters, where it does not appear that the city is irresponsible, and where such cutting off would expose it to danger from fire or disease, and would cause great public inconvenience and suffering.¹ On the other hand, and on like considerations of preponderating public benefit, equity has, for the purpose of preventing multiplicity, jurisdiction in the first instance of a bill to enjoin enforcement of a city ordinance on an averment that it is void, where it affects several hundred thousand tax-payers, and is filed by some hundreds of complainants on behalf of themselves and others interested.²

§ 698. **Principles generally applicable.** — The principles discussed in the preceding sections of this chapter are applicable to every political subdivision of the state falling within the definition of a municipal corporation, and an injunction will, in a proper case, be granted to prevent misappropriation and other illegal acts of county, district, township, and school officers to the same extent, under the same conditions, and with like force and effect as in the case of cities and towns incorporated under general laws or special charters. Any misappropriation by a board of county commissioners of county funds may be enjoined at the suit of a tax-payer brought in proper time. And an injunction will be granted to restrain county commissioners from appropriating the county funds in aid of a private corporation, without lawful authority, or in a different manner, or upon different terms than as authorized by law.³

ing under the Kansas statute, to test the validity of an election held on the question of issuing county bonds, the issue of the bonds should be enjoined, is a matter of judicial discretion. *Johnson v. Wilson, County Commissioners*, 34 Kan. 670.

¹ *Fisk v. City of Hartford*, 40 A. 906 ; 70 Conn. 720.

² *City of Chicago v. Collins*, 51 N. E. 907 ; 175 Ill. 445.

³ *Warren Co. Agr., etc. Co. v. Barr*, 55 Ind. 30. See also *Colton v. Hanchett*, 13 Ill. 615 ; *Rothrock v. Carr*, 55 Ind. 334, donation in aid of erection of school-house enjoined ; *Pope v. Inhabitants, etc.*, 12 Cush. 410, injunction against illegal loan of public money.

II. ILLUSTRATIONS.

A. IN ACTIONS TO RESTRAIN WRONGS TO PUBLIC.

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| <p>§ 699. Granting Aid to Private Enterprises.</p> <p>700. Bonds valid in the Hands of Innocent Purchaser.</p> <p>701. Same — Non-compliance with Conditions.</p> <p>702. Same — Failure to submit to Popular Vote.</p> <p>703. Verification by Assessor as Evidence of Assent.</p> <p>704. Irregularities in calling, notifying, and conducting Election.</p> <p>705. Premature Delivery of Bonds.</p> <p>706. Implied Conditions.</p> <p>707. Issue of Bonds, etc., under Unconstitutional Statute.</p> <p>708. Incurring Excessive Indebtedness.</p> <p>709. Discriminations between Subdivisions.</p> <p>710. Fraudulent Withdrawal of Public Funds.</p> | <p>§ 711. Same — Essential Averments.</p> <p>712. Same — Disregard of Conditions imposed by Law.</p> <p>713. Disbursements without Consideration — Donations.</p> <p>714. Appropriation to a Purpose other than that for which Fund created.</p> <p>715. In the Matter of making and accepting Performance of Contracts.</p> <p>716. Same — Statutory Restrictions.</p> <p>717. Same Subject — Illustrations.</p> <p>718. Letting to Lowest Bidder.</p> <p>719. Annexation of New Territory.</p> <p>720. Unauthorized Use of Public Property.</p> <p>721. Removal of County Seat.</p> <p>722. Removal of Officers from County Seat.</p> <p>723. Organization of Municipalities.</p> |
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§ 699. **Granting Aid to Private Enterprises.** — The jurisdiction pertaining to municipal aid to improvements of a *quasi* public character, such as railroads and manufacturing enterprises, is of modern origin, being unknown to the English courts of chancery. Such aid is usually in the form of a stock subscription in payment of which the bonds of the municipal corporation are issued, but it may and frequently does take the form either of an outright donation of money, or of bonds promising to pay money in the future and bearing interest in lieu of ready money. There is no implied power in a municipal corporation either to subscribe for stock in a private corporation or to donate public funds to aid private individuals or corporations in their enterprises, however laudable and beneficial to the public. Such power must be sought in municipal charters and general laws, and if not there found cannot be legally exercised; and if without statutory authority municipal authorities, either with or without popular approval, attempt to appropriate or pledge the public credit to any such purposes, their acts are *ultra vires* and void, and may be enjoined by any citizen and tax-payer who can show that such illegal proceeding will result in placing upon him an additional burden of

taxation. But where there is a total absence of statutory authority for making stock subscriptions or issuing bonds, issues of these are totally void, and purchasers and holders of them are chargeable with notice of their illegality. Consequently they do not constitute any public charge, and no injunctive relief would seem to be necessary until the levying and enforcement of a tax for their payment is attempted, or until the municipal authorities are threatening or about to proceed to apply public funds in payment of the principal or interest which they represent.¹ Nevertheless relief by injunction has been frequently granted in the total absence of legislative authority therefor to restrain the issue of negotiable bonds by municipal authorities.²

§ 700. **Bonds valid in the Hands of Innocent Purchaser.** — It is a general and well-established principle, however, that an injunction lies to prevent any diversion of municipal funds or pledge of municipal credit which would be binding upon the municipality and consequently a charge upon the tax-payers in the hands of innocent purchasers without notice of facts rendering the evidences of indebtedness illegal.³

The danger of losing evidence of defences to municipal bonds and the avoidance of a multiplicity of suits is usually an impor-

¹ In *Polly v. Hopkins*, 74 Tex. 145; 11 S. W. 1084, it was held that the county commissioners' court being by Rev. St. Tex. arts. 1514, 1521, the only body empowered to authorize contracts for the erection of county buildings, injunction would not lie to restrain the issuance of bonds in payment for a county jail, to be constructed under an alleged contract made by one of the judges of the commissioners' court, not only without the authority but directly contrary to the resolution of that court. Such bonds were considered to be utterly void in the hands of all purchasers.

² *Commissioners of Delaware Co. v. McClintock*, 51 Ind. 325; *Curtenius v. Grand Rapids, etc. R. R. Co.*, 87 Mich. 583; *Lynch v. Eastern L. F. & M. R. Co.*, 57 Wis. 430; *Campbell v. Paris & D. R. Co.*, 71 Ill. 611; *Gulf R. Co. v. Commissioners of Miami Co.*, 12 Kan. 230.

³ *Allen v. Inhabitants of Jay*, 60 Me. 124; *Commissioners of Delaware Co. v. McClintock*, 51 Ind. 325; *Supervisors of Livingston Co. v. Weider*, 64 Ill. 427; *List v. City of Wheeling*, 7 West Va. 501; *Foster v. Kenosha*, 12 Wis. 616; *Jackson Co. v. Brush*, 77 Ill. 59; *Gulf R. Co. v. Commissioners of Miami Co.*, 12 Kan. 230; *State v. Saline Co. Court*, 51 Mo. 350; *Chestnutwood v. Hood*, 68 Ill. 132; *Campbell v. Paris & D. R. Co.*, 71 Ill. 611; *Allison v. Louisville H. C. & W. R. Co.*, 9 Bush, 247; *Harrington v. Town of Plainview*, 27 Minn. 224; *McPike v. Pen*, 51 Mo. 63; *Metzger v. Attica & A. R. Co.*, 79 N. Y. 171; *Countermand v. Dublin Township*, 38 Ohio St. 515; *Curtenius v. Hoyt*, 37 Mich. 583. Injunction granted to restrain the unauthorized issue of bonds for the erection of a school-house. *Bowen v. Mayor, etc.*, 79 Ga. 709.

tant reason for enjoining actions upon bonds issued without legal authority.¹ And since the proper office of an injunction is the prevention of prospective rather than the correction of past wrongs, an injunction will not be granted to restrain the issue and delivery of bonds to a railroad company where they have already been issued and delivered.² But a railroad company to which bonds illegally issued have been delivered may be restrained by injunction from selling or otherwise disposing of the same.³

§ 701. **Same — Non-compliance with Conditions.** — An injunction is the most appropriate and usually the only remedy which will give the specific relief suited to the necessities and exigencies of the case where statutes exist which authorize the making a municipal subscription or the issuing of bonds in payment for the same, but there has been a total non-compliance, or not a substantial compliance, with statutory conditions and requirements, by reason of which they are voidable in the hands of all persons having notice of the facts, but which would not be a valid defence against such evidences of indebtedness in the hands of third parties who purchased in good faith and without notice. So, where a statute authorizes an issue of bonds and prescribes the provisions to be inserted as to the rate of interest to be paid and the times of payment of the same, an issue of bonds providing a different rate of interest or for the payment of interest oftener than as specified will warrant an injunction to restrain such issue in disregard of the statutory requirements, as where a statute directed that the interest should be made payable annually and the bonds stipulated that the interest should be paid semi-annually.⁴

§ 702. **Same — Failure to submit to Popular Vote.** — And where the statute giving authority to a municipal corporation to lend its aid or issue its bonds to a railroad company or other enterprise requires the proposition to do so to be first submitted to a popular vote, and prescribes the time and manner of holding the election giving notice for the same and ascertaining the result, a failure to submit and have such proposition voted upon or to comply with

¹ *Town of Springport v. Teutonia Sav. Bank*, 75 N. Y. 397.

² *Menard v. Hood*, 68 Ill. 121.

³ *Allison v. Louisville, etc. R. Co.*, 9 Bush, 247.

⁴ *English v. Smack*, 34 Ind. 115.

any of the important requirements governing such submission affords ample ground for relief by injunction.¹ A clear case for an injunction is presented where the issue of bonds in payment of a subscription is attempted in disregard of a constitutional provision requiring the proposition for such issue to be previously submitted to a vote of the people.² And commissioners appointed to issue township bonds when the statute requires the written consent of a majority of tax-payers and landowners to be obtained, will be restrained by injunction from issuing the bonds, when they have only procured the consent of a majority of landowners and have not procured the consent of a majority of the tax-payers.³ A statute authorizing a city to issue bonds in aid of a railroad, provided the city council "shall first submit the question of the issuing of such bonds to a vote of the legal voters" of said city, also providing that "the proposition of the question must be accompanied by a provision to levy a tax annually for the payment of the interest on said bonds as it becomes due," and "shall state the rate of interest such bonds shall draw, and when the principal and interest shall be made payable." In an action to enjoin the issuing of the bonds, it appeared that the whole question had not been submitted to the electors of the city, and that no vote had been submitted or adopted for the payment of the principal at any time. It was held that the injunction granted by the court below should be affirmed.⁴ So where a city council had acted upon a petition which a statute required to authorize a subscription and had denied it, and two years later rescinded the resolution denying it and passed another authorizing the subscription, an injunction was granted to restrain the issue of bonds in payment of the same.⁵

§ 703. **Verification by Assessor as Evidence of Assent.** — Where by statute the written consent of a certain proportion of tax-payers, verified by the affidavit of town assessors, is prescribed

¹ See *State v. Hancock County*, 11 Ohio St. 188; *Oregon v. Jennings*, 119 U. S. 74; *Chicago, etc. R. Co. v. Marseilles*, 84 Ill. 145; *Mellen v. Town of Lansing*, 19 Blatchford, 512, all holding that such non-compliance is a valid defence at law.

² *State v. Saline Co. Ct.*, 51 Mo. 850.

³ *Lane v. Schomp*, 20 N. J. Eq. (5 C. E. Gr.) 82.

⁴ Following *State v. Babcock*, 21 Neb. 599; 83 N. W. 247; *Cook v. City of Beatrice*, (Neb.) 48 N. W. 828.

⁵ *City of Madison v. Smith*, 88 Ind. 502.

as the evidence of popular assent to an issue of bonds, a court of equity will not, upon an application for an injunction against issuing the bonds, go behind such evidence to ascertain whether the requisite consent of a sufficient number of the tax-payers was in fact obtained.¹

§ 704. **Irregularities in calling, notifying, and conducting Election.** — The established rule of non-interference by courts of equity with the political aspects of elections has no application where it becomes necessary to determine the legality of an election upon a proposition to issue municipal aid bonds, or grant municipal aid in the form of a stock subscription with a view to enjoining action or proceeding upon it by municipal officers. And upon a bill by the tax-payers to restrain an issue of bonds to a private corporation, on the ground of non-compliance with statutory requirements touching the matter of holding and conducting the election under which the bonds were issued, the court has undoubted jurisdiction to inquire into and determine the legality of such election. Such case is not to be identified with that in which it is sought to contest the result of an election and settle the right to an office claimed under it; but the inquiry partakes of the character of the investigation and determination of a fact necessary to the ultimate disposition of and adjudication upon the issue, namely, whether the contract in question has been duly authorized according to law.²

§ 705. **Premature Delivery of Bonds.** — Upon proper application the delivery of negotiable bonds by a public corporation will be enjoined, when the statute authorizing their delivery only upon certain terms has not been complied with in matters of substance.³ And if a railroad company fails to comply with the conditions on which a county subscription is made to its stock, any citizen or tax-payer of the county may obtain an injunction to prevent its

¹ *Pierce v. Wright*, 6 Lans. 306. The holding of an election upon a proposition to issue bonds or take stock under statutory authority and according to statutory provisions will not be enjoined. *Walton v. Develing*, 61 Ill. 201; *Darst v. People*, 62 Ill. 306.

² *McDowell v. Massachusetts, etc. Co.*, 96 N. C. 914; *Goforth v. Rutherford, etc. Co.*, 96 N. C. 535. See also *State v. Commissioners Wabaunsee Co.*, 36 Kan. 180. Injunction will not issue upon mere technical and formal grounds of objection to the manner of calling, notifying, and conducting an election which do not affect the correctness of the result. *Trimmer v. Bomar*, 20 S. C. 354.

³ *Union Pacific R. R. Co. v. Lincoln Co.*, 8 Dill. 800.

receiving the bonds of the county, and to compel the surrender for cancellation of any bonds already issued.¹ So where municipal bonds were authorized to be issued to a railroad company upon such conditions as should be prescribed by the voters of the municipality at an election upon a proposition submitted to them, and one of the conditions imposed was that the bonds were not to be delivered until the railroad was completed and in operation to a certain point, and the municipal officers were about to issue and deliver the bonds upon the completion of the road for a part of the distance, and the leasing and adoption of the line of another road for the balance, an injunction was held properly granted to restrain delivery of the bonds.² The most important equitable reason for granting relief against the issue and delivery of bonds without compliance with the conditions upon which they are authorized is, that in the hands of innocent purchasers without notice of non-compliance with the conditions, the municipal corporations would have no valid defence in an action upon such bonds or other evidence of indebtedness.³

§ 706. *Implied Conditions.* — But municipal officers will not be held bound to observe any other conditions than those expressed or necessarily implied from the terms of the statute conferring upon them authority. When the condition upon which the subscription was made was that it should not be binding unless subscriptions were obtained from other towns, the court refused to pass upon the validity of such other subscriptions upon an application to enjoin the issue of bonds about to be executed and delivered in payment; and unless it is so expressly declared or necessarily implied from the terms of the statute conferring authority to make a subscription that a vote shall be had upon the proposition submitted to the people as a condition precedent to making such subscription, no injunction will be granted on the ground that no such vote has been had.⁴ But a substantial change in the character of the enterprise contemplated by a railroad company in aid of which a subscription is made, will warrant an injunction to restrain an issue of bonds in payment. So any

¹ *Wagner v. Meety*, 69 Mo. 150.

² *Lawson v. Snellen*, 33 Wis. 288. See also *Wagner v. Meety*, 69 Mo. 150; *Supervisors of Jackson Co. v. Brush*, 77 Ill. 59.

³ *Danville v. Montpelier R. Co.*, 43 Vt. 144.

⁴ *Phillips v. Town of Albany*, 28 Wis. 340.

alteration in the character of the corporation, such as a consolidation with another company, or procuring the franchise of another railroad running at right angles with the one to which the subscription is made, is sufficient to justify an injunction to enjoin the officers of a municipal corporation from completing a contract of subscription, and issuing bonds in payment therefor.¹

§ 707. **Issue of Bonds, etc., under Unconstitutional Statute.** — A tax-payer may enjoin municipal authorities from issuing and negotiating bonds in payment of a subscription made under an unconstitutional statute.² And in such case a complaint was held sufficient that averred upon information and belief that a railroad company was about to demand of town supervisors the bonds in question, and there was danger that unless prevented the bonds would be issued and delivered.³ On the same principle a citizen and tax-payer of a county may maintain a suit against county officers to restrain them from auditing and allowing bills against the county incurred in the execution of an unconstitutional registration law.⁴ It has also been held that a citizen and tax-payer, suing on behalf of himself and all others similarly situated, may enjoin a state treasurer from issuing and delivering the bonds of the state in aid of a subscription to a railroad company under an unconstitutional act of the legislature.⁵ Relief in such a case has been extended to a creditor whose rights were impaired by an issue of bonds under an unconstitutional statute.⁶

§ 708. **Incurring Excessive Indebtedness.** — Injunction is likewise the appropriate remedy to prevent municipalities from incurring indebtedness in excess of the maximum fixed by the constitution or laws of the state, and will be granted upon proper application of an individual tax-payer.⁷ But it was held that an injunction

¹ *Noesen v. Town of Port Washington*, 37 Wis. 168; *Perkins v. Town of Port Washington*, 37 Wis. 177.

² *Allen v. Inhabitants of Jay*, 60 Me. 124.

³ *Campbell v. Paris & D. R. Co.*, 71 Ill. 611.

⁴ *White v. County of Multnomah*, 13 Or. 317; 10 P. 484.

⁵ *Galloway v. Jenkins*, 63 N. C. 147.

⁶ *Smith v. Appleton*, 19 Wis. 468.

⁷ *City of Springfield v. Edwards*, 84 Ill. 626; *Grayville v. Gray*, 19 Ill. App. 120; *Spilman v. City of Parkersburg*, 85 W. Va. 605; 14 S. E. 279; *Sackett v. City of New Albany*, 88 Ind. 473; *Davenport v. Kleinschmidt*, 6 Mont. 502. See also *Hudson v. Mayor*, 64 Ga. 286. See also *Miles v. Ray*, 100 Ind. 166, holding that a tax-payer who has paid that portion of the tax levied to pay a donation to a railroad may enjoin a tax in excess of the limit fixed by law

issued to restrain municipal authorities from increasing the debt of a city by contracting in its name and on its credit for municipal improvements, and for furnishing the city hall, etc., on the ground that the indebtedness of the city was thereby increased beyond the amount allowed by its charter, and that the proposed expenditures were not included within the appropriations for the year, should be dissolved as to certain portions of the property on the ground of *laches*, in not filing the bill until after the contracts therefor had been made, and the parties had entered into bonds to perform them, those persons not being made parties to the bill, and the bill neither seeking to restrain them from performing the contract, nor the city from compelling performance.¹

§ 709. **Discriminations between Subdivisions.** — Discriminations between subdivisions of a municipality entitled to share in the distribution of a public fund may be enjoined at the suit of a tax-payer residing within a subdivision discriminated against. Thus, where school funds are held by township officers for the benefit of all the schools in the township, to be apportioned according to scholastic population, but are being wrongfully appropriated to the support of one school to the exclusion of others, a citizen and tax-payer of the township is entitled to an injunction to prevent such misapplication of the funds.² So an injunction will lie to prevent a town treasurer from disbursing school funds in payment for the erection of a school-house at another place than that authorized by law.³

§ 710. **Fraudulent Withdrawal of Public Funds.** — County boards of supervisors will be enjoined from illegal and fraudulent action in auditing and allowing claims in their own favor; and where warrants have been drawn upon the county treasurer for the payment of warrants which were drawn and delivered in pursuance of a conspiracy to defraud the county by presenting and allowing fraudulent claims for pretended services, the payment of such warrants will be enjoined at the suit of any tax-payer.⁴ And for the paying of donations to railways; *Putnam v. City of Grand Rapids*, 58 Mich. 416, where it was held that the making of contracts for lighting the streets of a city which involve the incurring an indebtedness in excess of that limited by law may be enjoined.

¹ *Collings v. City of Camden*, 27 N. J. Eq. 293.

² *Maloy v. Madget*, 47 Ind. 241.

³ *Marble v. McKenney*, 60 Me. 332.

⁴ *Colton v. Hanchett*, 13 Ill. 615; *Beauchamp v. Board of Supervisors*, 45 Ill. 274; *Perry v. Kiuneear*, 42 Ill. 160. See also *Andrews v. Pratt*, 44 Cal.

where it appears that a warrant illegally issued by a town has already been called in and cancelled, it is within the powers of a court of equity to grant affirmative relief by an order restraining the future reissue of such warrant.¹ So a tax-payer may maintain a suit to enjoin the drawing of a warrant for the price of land purchased without the publication of the prescribed notice;² also to prevent the refunding of taxes ordered by a county board of supervisors; nor is such allowance a judgment the validity of which can be questioned only by appeal or *certiorari*.³ On the same principle an injunction will be granted against taxes laid to pay a judgment recovered against a school district by fraud and collusion with its officers.⁴

§ 711. **Same — Essential Averments.** — In an action by a tax-payer under the New York statute permitting tax-payers to sue to restrain unlawful official acts, against a town supervisor, to restrain the payment of certain bills presented by the highway commissioners, an injunction will not be granted where plaintiff fails to allege and prove that the bills were not audited by the board of auditors, or that there was no legally constituted board, or that the audit was illegal, or that the bills were unjust, or that the commissioners had failed to make their reports to the board, or that the payment of the bills would injure plaintiff.⁵ But it is held that to warrant the granting of an injunction restraining the drawing of a warrant on a county treasurer to pay for land bought by the county in violation of the California county government act, it is not necessary that it be alleged or shown that the county or plaintiff will be damaged if the purchase is completed, or that the value of the land is less than the price to be paid.⁶

309. But in the same court it was held that a board of county supervisors should not be enjoined upon application of a tax-payer from the unauthorized erection of a building, the decision being based upon the ground that since the erection of the building was unauthorized, it could not injure the tax-payer by becoming a charge upon his property. *Linden v. Case*, 46 Cal. 171. See also *Merriam v. Board of Supervisors*, 72 Cal. 517, holding upon the same reasoning that a tax-payer cannot enjoin supervisors from auditing and allowing fraudulent claims against the county. To same effect, *Winn v. Shaw*, 87 Cal. 631; 25 P. 244.

¹ *Russell v. Tate*, 52 Ark. 541; 13 S. W. 130.

² *Winn v. Shaw*, 87 Cal. 631; 25 P. 968.

³ *Hospers v. Wyatt*, 63 Iowa, 264.

⁴ *Nevil v. Clifford*, 55 Wis. 161.

⁵ *Warren v. Van Nostrand*, 3 N. Y. S. 151.

⁶ *Winn v. Shaw*, 87 Cal. 631; 25 P. 968.

§ 712. **Same — Disregard of Conditions imposed by Law.** — Where conditions and formalities are prescribed to which it is made the duty of municipal officers to comply in the disbursement or withdrawal of public funds, a withdrawal or expenditure without compliance is illegal, and will warrant an injunction for its prevention, as where a town officer attempts to appropriate to his own use and benefit certain fees claimed by him before the same have been audited and allowed by the proper officers as required by law.¹ On the same principle the attempted enforcement of an illegal ordinance or order for vacating a street may be enjoined, where its illegality consists in the want of consent on the part of property owners injuriously affected by its enforcement.² So where the law requires the presentation to the municipal board or controlling body of a petition as a condition to the passage of an ordinance for making street improvements, such petition is necessary to the jurisdiction of the board, and the making any improvement in the absence of a petition may be enjoined.³

§ 713. **Disbursements without Consideration — Donations.** — An appropriation to pay gratuities is unauthorized and will warrant the granting of an injunction, as where county officers undertake to pay a new gratuity to a judge out of the county funds.⁴ So

¹ Warren v. Baldwin, 105 N. Y. 584.

² Speigel v. Gansberg, 44 Ind. 418.

³ Town of Covington v. Nelson, 35 Ind. 532. See also Makesom v. Kauffman, 35 Ohio St. 444; Dennison v. City of Kansas, 95 Mo. 416. In such case, the application for injunction is properly made by a resident tax-payer, suing on behalf of himself and all others similarly situated. Town of Covington v. Nelson, 35 Ind. 532.

⁴ Perry v. Kinnear, 42 Ill. 160. In this case the court say: "In the absence of some law authorizing the performance of the act, the board has no power to make such an appropriation. And being unauthorized and illegal, its consummation should have been restrained. By an unauthorized tax the citizen is deprived of his property without sanction of law. And bodies created for the discharge of public duties, and to aid in conducting the affairs of counties, have not been intrusted with the power to seize and appropriate the property of the people to any but legal purposes. The inhabitants of the state have been secured in the possession and enjoyment of their property against as well the officer created by law as private persons. The former can only exercise power to deprive him of it in the mode and for the purposes constitutionally authorized by law. If his property may be seized for one illegal purpose it may for another, and all protection ceases. The power to levy and collect taxes is a power to take from the citizen his money, with or without his consent, and when it is attempted to exercise such a power, courts will

municipal officers will be enjoined from making a donation of municipal obligations to a railroad company;¹ and the appropriation of municipal funds for celebrations and public entertainments will be enjoined at the suit of tax-payers in the absence of any legal authority to devote money to such purposes.² The same principle forbids the disposal of property and valuable franchises without consideration when these might be made the means of great profit and advantage to the city; and attempting to do so furnishes sufficient ground for interference by injunction.³

§ 714. **Appropriation to a Purpose other than that for which Fund created.** — The application of public funds for another purpose than that for which they were collected by taxation may be enjoined as an unlawful diversion, although the object of the appropriation be legitimate and the probable results beneficial and the motives for making it unquestionable; and a fund raised by assessments upon property owners for the improvement of the streets of a city cannot be legally applied to another and different purpose, and an attempt to so apply it or any portion of it may be enjoined.⁴ On the same principle, when money raised by taxation has been set apart for the payment of interest on certain bonded indebtedness, the holders of the bonds may enjoin its appropriation by the municipal authorities to another purpose than the payment of the interest due them, such fund constituting a trust in their favor.⁵ But an injunction should not issue to

not hesitate to afford preventive relief." It was also held in this case that the supervisors could not evade the injunction by rescinding the first order appropriating the money and passing another for the same purpose. See also *Beauchamp v. Board of Supervisors*, 45 Ill. 274.

¹ *Whiting v. Sheboygan, etc. R. Co.*, 25 Wis. 167.

² *Austin v. Coggeshall*, 12 R. I. 329; *Tash v. Adams*, 10 Cush. 252.

³ *Milhau v. Sharp*, 15 Barb. (N. Y.) 193.

UNAUTHORIZED PUBLICATION OF TAX LIST. — Injunction is a proper remedy at suit of property owners and tax-payers in a county to restrain the county commissioners from making publication of the delinquent tax list in a publication which is not a newspaper such as is required by law, and from using county funds to pay for such unauthorized publication. This is not seeking to restrain levy and collection of taxes; it is an endeavor to protect the tax from being invalidated and lost, and to protect the county funds from misapplication. *Sinclair v. Commissioners of Winona*, 23 Minn. 404.

⁴ *Lutes v. Briggs*, 5 Hun, 67. But where a method of legal redress by appeal is provided injunction does not lie. *Nance v. Johnson*, (Tex. Sup.) 19 S. W. 559.

⁵ *Maenhaut v. New Orleans*, 2 Woods, 108; *Chaffraix v. Liquidation Board*, 11 Fed. Rep. 638.

restrain the officers having charge of a municipal treasury from making payments out of the moneys raised by them, in anticipation of the collection of a tax, authorized to be levied for the purpose of meeting such payments.¹ And an action at law affords an adequate remedy for enforcing payment of coupons due on bonds of a city out of the funds provided by statute, or to compel the proper officers to set apart taxes collected as a sinking fund for the payment thereof, and the bondholder cannot, by a bill in equity, not ancillary to any pending proceeding at law, enjoin application of the funds to other purposes.²

§ 715. *In the Matter of making and accepting Performance of Contracts.* — Equity will not interfere with the making and carrying out of contracts by municipal corporations within the scope of the authority conferred upon them by law, in the absence of fraud or irregularity on the part of the officials acting for such corporations.³ And where municipal authorities are contracting for and having made street improvements, they will not be restrained from proceeding therewith at the suit of an individual tax-payer whose property has not been interfered with, and when no assessments have been made or taxes levied to meet payments on the same.⁴ The same rule applies to contracts for lighting the streets, and an individual tax-payer cannot maintain an action for an injunction to restrain the making of a contract for that purpose without showing that special injury will result to himself.⁵ It is otherwise where the entering into and performance of a contract by municipal authorities is an abuse of corporate authority and in contravention of the laws by which the municipality is governed.⁶ And it was held to be error to dismiss a bill to en-

¹ *Fitzpatrick v. Flagg*, 5 Abb. (N. Y.) Pr. 213. Compare *Hecker v. Mayor*, 18 Id. 369.

² *Hausmeister v. Porter*, 21 Fed. Rep. 355.

³ *Pullman v. Mayor*, 54 Barb. 169. See also *Morris v. Mayor*, 10 C. E. Green, 345; *Plessner v. Pray*, 8 Ohio Com. Pl. 149; 6 Ohio N. P. 444. *Public printing.* — Where a city council has let a contract to do the public printing to the lowest bidder, as required by the city charter, the fact that such bidder is not the publisher of a newspaper does not authorize an injunction restraining him from proceeding to execute the contract; and the court granting it has no power to punish the bidder for disobeying the order as for contempt. *State v. Milligan*, (Wash.) 28 P. 369. See also *Anderson v. Stoufer*, (Kan.) 27 P. 1000.

⁴ *Phelps v. City of Watertown*, 61 Barb. 121.

⁵ *Searle v. Abraham*, 7 Iowa, 507.

⁶ *Cincinnati S. R. Co. v. Smith*, 29 Ohio St. 291. One may, as tax-payer,

join the execution of a contract for public improvements containing an illegal stipulation, even though the contractor has begun the work, where it appears that he agreed to do the work for a less sum, in the absence of such stipulation, as relief should be granted in such case, at least to the extent of the difference in cost.¹

§ 716. **Same — Statutory Restrictions.** — Municipal officers empowered to let contracts for public improvement are usually restricted by the terms of the charter under which they act or by the general law in the performance of such duties. Sometimes they are given considerable latitude of discretion, but in most cases they are subjected to stringent conditions and requirements as to letting contracts to the lowest bidder, advertising, exacting bonds, and the like. Whatever the terms prescribed they must be strictly complied with; and a disregard or failure to comply with any such conditions will warrant the granting of an injunction against further proceeding with the proposed improvement, whether it be the erection of public buildings, the construction of bridges, the making of roads, or other public work. While such officers or bodies proceed within the scope of legal authority conferred upon them and according to the conditions imposed, their action cannot be impeded by any court; but when they exceed, or act in the absence of legal authority, their acts are void and may be enjoined at the suit of any tax-payer who can show that expenses are about to be incurred which will become a public charge.²

§ 717. **Same Subject — Illustrations.** — The acceptance of work contracted for on the part of a municipal corporation but not done according to the contract in substantial and important respects, the difference inuring to the benefit of the contractor at the loss

sue to enjoin consummation of a contract for city work awarded in violation of a statute and ordinance, requiring it to be let to the lowest bidder, though he is such bidder. *Holden v. City of Alton*, 53 N. E. 556; 179 Ill. 318. See also *Sanitary Reduction Works of San Francisco v. California Reduction Co.*, 94 F. 698.

¹ *Adams v. Brenan*, 52 N. E. 314; 177 Ill. 194; 42 L. R. A. 718.

² *Follmer v. Nuckalls Co.*, 6 Neb. 204; *Crabtree v. Gibson*, 78 Ga. 230. They may be restrained from letting a contract without advertisement as required by law. *Schumm v. Seymour*, 9 C. E. Green, 143. They may be enjoined when proceeding to let a contract at a different date than that fixed in the advertisement. *Commissioners of Benton Co. v. Templeton*, 51 Ind. 266.

of property owners and tax-payers, constitutes a breach of trust and unlawful and fraudulent diversion of public funds warranting an injunction to restrain payment.¹ And township trustees who are about to enter into a forbidden contract may be enjoined at the suit of a tax-payer, whether or not such contract would be void if made.² So a tax-payer of a city can sue to enjoin the execution of an illegal contract by the city with a bank for the deposit with it of the public moneys.³ In another case it was held that a property owner on a street, who had been such from the beginning of the proceeding to pave the street, which resulted in awarding an illegal contract therefor, and who was liable to be assessed for the paving, had a right to maintain a suit to enjoin the prosecution of the work, though it was conceded that the bill was filed by him as a cover for an unsuccessful bidder for such contract.⁴ But an injunction will not be granted against municipal officers to restrain the execution of a contract to supply the city departments with stationery, upon the application of an unsuccessful bidder for the contract, although the successful bidder is charged with having fraudulently obtained the contract.⁵

Under a statute which authorizes an injunction at the instance of tax-payers to prevent the officers of a municipality from wasting the funds, etc., under their control, a city council will be enjoined from completing a contract for the purchase of a school-house site at a price greater by one fourth than its value, at the highest estimate both of a large majority of the witnesses, and of those best qualified to decide, no apparent effort being made to obtain the land at a less price.⁶

§ 718. **Letting to Lowest Bidder.** — Where no conditions or restrictions are imposed upon municipal officers in the matter of letting contracts they are not obliged to let the work to the lowest

¹ Schumm v. Seymour, 9 C. E. Green, 143; Carthan v. Lang, 69 Iowa, 384.

² Middleton v. Greeson, 106 Ind. 18; 5 N. E. 755.

³ Yarnell v. City of Los Angeles, 87 Cal. 603; 25 P. 767.

⁴ Mazet v. City of Pittsburgh, (Pa.) 20 A. 693.

⁵ Kelly v. Baltimore, 53 Md. 134.

⁶ Winkler v. Summers, 5 N. Y. S. 723; 22 Abb. (N. C.), 80, holding also that a verbal promise by the comptroller, acting under authority of the council, to take the land at the price asked, though followed by the delivery of a deed to the corporation counsel for examination, is not such a completion of the contract as to prevent the maintenance of an action to restrain its consummation.

bidder, and cannot be enjoined for a refusal to do so unless guilty of fraud. They may exercise an unlimited discretion so long as they are not guilty of gross abuse of discretion and do not pervert their powers to such an extent as to amount to a fraudulent misappropriation of the public funds.¹ And where, under a charter provision requiring contracts for public improvements to be let to the lowest bidder, a portion of a work of improvement has been let in accordance with the prescribed conditions and subsequently a new advertisement is published for the part not let, but no bids are received, an injunction will not be granted against a tax assessed to pay for the work already contracted for.²

§ 719. **Annexation of New Territory.** — Injunction is the proper remedy to prevent enlargement of the territorial limits of a municipal corporation without legal authority or in an illegal manner. So long as the conditions prescribed by law are complied with and the limitations upon their legal authority not transcended, those intrusted with the duty and power to extend municipal boundaries and annex adjacent territory will not be interfered with.³ But any excess of legal authority by a municipal officer in the annexation of new territory will warrant an injunction at the suit of a tax-payer whose taxes would be thereby increased.⁴ And residents of the annexed territory may likewise maintain an action in such case on like grounds.⁵ And on the ground that the property of a municipal corporation is held by it in trust for the public it may maintain a bill to restrain another municipality from interfering with such property and from exercising control over any portion of its territory under illegal and void annexation proceedings.⁶ But a creditor of a county has no such interest as will entitle him to an injunction to restrain a change in its boundary line on the ground that the security for his debt will be diminished.⁷

§ 720. **Unauthorized Use of Public Property.** — The letting of property belonging to a municipal corporation to unauthorized

¹ *Cleveland F. A. T. Co. v. Board of Fire Commissioners*, 55 Barb. 288.

² *Brevoort v. Detroit*, 24 Mich. 322.

³ *Stilz v. City of Indianapolis*, 55 Ind. 515. See also *Graham v. City of Greenville*, 67 Tex. 62.

⁴ *Pittsburgh's Appeal*, 79 Pa. St. 817; *Delphi v. Stortzman*, 104 Ind. 343.

⁵ *City of Delphi v. Stortzman*, 104 Ind. 343.

⁶ *Village of Hyde Park v. City of Chicago*, 124 Ill. 156.

⁷ *Moore v. Ballard*, 69 N. C. 21.

uses will be enjoined at the suit of resident tax-payers ; and the use of a school-house for religious worship when not expressly authorized is held to warrant the granting of an injunction to restrain the officers of the school district from permitting such use at the suit of a tax-payer without his showing special damage, since he is without means of redress at law.¹ School officers may be enjoined from leasing a public school-house for the purpose of keeping a private school.² And the use of a public school-house for any private purpose, such as the holding of religious or political meetings, social gatherings, and the like, is unauthorized by law, and may be restrained at the instance of any party injured thereby, and this though a majority of the electors and tax-payers of the district assent to such use and an adequate rent is paid therefor ; and it is immaterial in such case that a majority of the citizens and the directors of the district have consented to the illegal use.³ An action by the municipality lies in such cases, for instance, to restrain illegal interference with its drainage system.⁴

§ 721. **Removal of County Seat.** — The unauthorized removal of a county seat may be enjoined ; and injunction is also the appropriate remedy to prevent county officers from removing their offices and the county records pending litigation concerning the removal of the county seat. In such case independent grounds other than the fact that the litigation is pending must be shown ; as, for instance, that at an election on the question of removal a majority of the votes cast were in the negative.⁵ It is sufficient, however, to warrant an injunction, to allege that the commissioners of a county threaten unlawfully to remove a county seat, and that they have not entered any order therefor from which an appeal could have been taken.⁶ But an injunction will not be

¹ Schofield v. Eighth School Dist., 27 Conn. 499 ; Hurd v. Waters, 48 Ind. 148. Compare Bell v. City of Platteville, 71 Wis. 139.

² Weir v. Day, 35 Ohio St. 143.

³ Spencer v. School Dist., 15 Kan. 259. As to right to change text-books used in public schools, and to enjoin such change, see School Dist. v. Shadduck, 25 Kan. 467.

⁴ Inhabitants of Melrose v. Cutter, (Mass.) 34 N. E. 695 ; 159 Mass. 461.

⁵ Shaw v. Hill, 67 Ill. 455. A court of equity will take notice that an election for the relocation of a county seat would, if unauthorized, be a waste of public money, and will enjoin the calling of such unauthorized election at the suit of a tax-payer. Solomon v. Fleming, (Neb.) 51 N. W. 304.

⁶ Doan v. Board of County Commissioners Logan County, (Idaho) 26 P. 167.

granted where the grounds relied upon are frauds alleged to have been practised upon county commissioners in the proceedings for removal, where such grounds could have been urged before final judgment in that action. And an injunction will be refused where a method for contesting an election on the question of removal has been provided by statute.² So where a board of county commissioners are by law clothed with exclusive authority to receive petitions for the removal of the county seat and have acted in the matter within the jurisdiction conferred upon them, and have ordered an election without any objections having been interposed to their action until after such election, the removal of the county offices to the new location will not be enjoined because of insufficiencies in the original petition for removal.³ Nor can proceedings for removal be collaterally attacked; and a court of equity will indulge a presumption in favor of the regularity of the proceedings instituted and prosecuted to final judgment by the commissioners.⁴

Reluctance of courts of equity to interfere in matters relating to elections has been already explained. Accordingly, a board of supervisors will not be enjoined from declaring the result of an election called by them upon the petition of citizens and held on the question of removing the county seat.⁵

§ 722. **Removal of Offices from County Seat.** — No mere private citizen and tax-payer, unless he has special and private interests in the subject-matter, or if he does not sustain the relation of a public officer prosecuting for the benefit of the public, can maintain an action to enjoin a county officer from removing his office to the place of relocation, pending litigation as to the proper location of the county seat.⁶ But where upon proceedings in mandamus county officers had been ordered to remove their offices to a new location which had been chosen at an election, but at a subsequent election another place was chosen, an injunction was

¹ *Markle v. Board of Commissioners*, 55 Ind. 185.

² *Scott v. McGuire*, 15 Neb. 303. See also *Weber v. Timlin*, 37 Minn. 274.

³ *Ellis v. Karl*, 7 Neb. 381.

⁴ *Commissioners of Clay Co. v. Markle*, 46 Ind. 96; *Bennett v. Hetherington*, 41 Iowa, 142.

⁵ *People v. Board of Supervisors*, 75 Cal. 179.

⁶ *McMillen v. Butler*, 15 Kan. 62. See also *Caruthers v. Harnett*, 67 Tex. 127.

held properly granted to restrain the execution of the judgment entered upon the former election for removal.¹

§ 723. **Organization of Municipalities.** — Equity has no jurisdiction to interfere with the formation of municipalities under statutes authorizing them to be formed and prescribing the method of procedure. If the proceedings are not according to the requirements of the statute the remedy is by an action in *quo warranto* to test the question of corporate existence.² Accordingly, an injunction was refused where sought to restrain municipal officers from proceeding with the formation of a school district under proper legal authority, the only ground alleged being that they had acted upon improper and insufficient evidence upon the application for the formation of such new district.³

B. IN ACTIONS TO RESTRAIN WRONGS SPECIALLY INJURIOUS TO INDIVIDUALS.

§ 724. In Exercise of Power of Eminent Domain.	§ 728. Same — Other Municipal Acts entitling Individuals to Relief.
725. Abuse of Power conferred by Ordinance.	729. Essentials of Relief against Street Improvements.
726. Cloud upon Titles — Illegal Assessments.	730. Same Subject.
727. Protection of Streets from Obstruction and Injury.	731. Where Contractor Proper Party Defendant.

§ 724. **In Exercise of Power of Eminent Domain.** — It is a general rule on this subject that municipal authorities may be restrained by injunction in all cases of improper and illegal proceeding under claim of right to do acts injurious to the rights of citizens and property holders ; and where land once dedicated to a particular public purpose, such as a street or square, is attempted to be appropriated by a common council of a city to another and entirely different purpose, any owner of a lot or lots adjacent to the street or square which is about to be appropriated to such other purpose may have the proceeding enjoined.⁴ So a

¹ Scott v. Paulen, 15 Kan. 162.

² Stephens v. Minnerly, 6 Thomp. & C. 818. See also People v. Clark, 70 N. Y. 518.

³ Lane v. Morrill, 51 N. H. 422.

⁴ Cooper v. Alden, Harring. (Mich.) 72; Marshall v. Commissioners, 89 N. C. 103; Shields v. Mayor, etc., 55 Ga. 150. A municipal corporation may be restrained by perpetual injunction from entering upon and taking possession of land, and opening and grading a street thereon, where it appears by an extrinsic fact that the commissioners have awarded the owner of the land

party who has been in the open, notorious, exclusive, adverse possession of a portion of a town site for a period of time sufficient to bar an action against him to recover possession thereof, thereby acquires an absolute title to said land, and may protect his possession by injunction against unlawful acts of the city authorities in attempting to open streets through his land on the strength of a plat made by a former owner.¹ And an action to enjoin authorities from irregular and illegal appropriations of land may be maintained by the state in the protection of its ownership of public lands, the power conferred by statute to municipal bodies for this purpose not being an absolute power but subject to the superior right of the state.² And the power to resort to eminent domain conferred upon a municipality to open streets and grant franchises to railroad companies does not deprive the state of its superior right. There is still reserved by the legislature the power superior to that of the city to impose an additional servitude upon the streets, as by granting to a private corporation the right to operate a street railway over them. For these reasons a court of equity will not grant an injunction at the suit of a municipal corporation to restrain the construction of a street railway in a city when it has been authorized by statute.³

§ 725. **Abuse of Power conferred by Ordinance.** — Where city authorities act fraudulently and maliciously in attempting to enforce a city ordinance, and attempt under it to appropriate to the public use for a street so much of the property of the owners on one side of the street that they are thereby deprived of any sidewalk, an injunction may properly be granted to prevent so flagrant a wrong.⁴ And an ordinance wrongfully reducing water rates,

only \$1 for land worth \$12. *Baldwin v. Buffalo*, 29 Barb. (N. Y.) 396. And injunction will lie to prevent the common council of a borough from requiring the destruction of a building being erected on land which it is claimed has been dedicated to public use. *Coast Co. v. Borough of Spring Lake*, (N. J. Ch.) 86 A. 21.

¹ *Schock v. City of Falls City*, (Neb.) 48 N. W. 468.

² *Mayor of Atlanta v. The Central R. Co.*, 53 Ga. 120.

³ *Savannah & Thunderbolt R. Co. v. The Mayor*, 45 Ga. 602.

⁴ *Carter v. City of Chicago*, 57 Ill. 283.

OBSTRUCTING SIDEWALK. — The common council of the city of New York, having, under Laws N. Y. 1882, c. 410 (consolidation act), sec. 86, subd. 4, "no power to authorize the placing or continuing of any encroachment or obstruction upon any street or sidewalk, except the temporary occupation thereof during the erection or repair of a building on a lot opposite the same," cannot

where the constitution and laws of the state apparently denounce severe pains and penalties upon collections of higher rates than those prescribed by the ordinance, so affects the water company's property rights, and hinders it in the collection of its lawful compensation, that equity will afford protection against such an ordinance, even though the city is taking no active steps to enforce it.¹ And a municipal corporation may be restrained at the suit of a landowner from laying a sewer through his land where the authorities are only authorized to lay sewers in the streets.² But with respect to irregularities in the proceedings under which authority is claimed to construct sewers and open streets, the proper remedy is by *certiorari*, and not by injunction.³ And a

authorize the maintenance, in a public street, of an awning supported by posts, which is an encroachment and obstruction upon the highway, although, by section 86, subd. 8, power is given to the council "to regulate the use of streets and sidewalks for signs, sign-posts, awnings, awning-posts," etc. Daly, C. J., dissenting. *Hoey v. Gilroy*, 14 N. Y. S. 159.

¹ *Los Angeles City Water Co. v. City of Los Angeles*, 88 F. 720. In the same case it was held that when a city annually passes ordinances regulating water rates for each year, an injunction against such an ordinance, which is illegal, will not be denied merely because the particular ordinance in question would necessarily expire before an appeal from a decree awarding the injunction could be disposed of.

² *Clark v. City of Providence*, 10 R. I. 437. Compare *McDaniel v. City of Columbus*, 87 Ga. 440; 13 S. E. 745. In this case the suit was brought to enjoin a city from constructing a sewer through plaintiffs' residence lot, and it appeared from defendants' affidavits that, on petition of some of the residents of the block, who agreed to pay the costs, the city council ordered the sewer to be built, and that it could only be constructed by crossing part of plaintiffs' lot. The affidavits on behalf of plaintiffs showed that there was no necessity for the sewer, that it would be of benefit only to a few individuals, and that it would injure plaintiffs' lot for residence purposes. The affidavits for defendants showed the sewer was necessary to the health of the public generally; that it would be constructed in such a manner as not to injure plaintiffs; that defendants had offered plaintiffs \$200 for a right of way, but they demanded \$650; and that defendants then selected an arbitrator, and requested plaintiffs to select another, as provided by law, to assess the compensation to be paid, but that plaintiffs failed to select one. *Held*, that there was no error in refusing an injunction. Where the connection of such drain does not appreciably affect the amount of sewage carried off by such sewer, the possibility that such drain will be followed by others that will eventually overtax the capacity of the sewer is too remote a danger to be the subject of equitable relief. 37 Ill. App. 326, affirmed; *Springer v. Walters*, (Ill. Sup.) 28 N. E. 761.

³ *Kelsey v. King*, 32 Barb. 410; s. c. 33 How. Pr. 39. Compare *Weisman v. Lucksinger*, 84 N. Y. 31.

PAROL EVIDENCE. — In proceedings to enjoin a town from opening a street, it appeared that the record of the board of trustees failed to show that

court of equity will not enjoin the threatened violation of city ordinances regulating the erection of buildings with a view to greater security against fire, unless irreparable injury is threatened complainant. To warrant the exercise of restraining power in such case, it must appear that the threatened act will result in a nuisance in fact, and not merely because it violates a city ordinance.¹ But where a city ordinance prohibits the erection of wooden buildings within its fire limits, individuals who show a threatened violation of the ordinance, and that if unrestrained it will work irreparable injury to them and their property, are entitled to an injunction, though the building, if erected, would not be a nuisance *per se*.²

§ 726. **Cloud upon Titles — Illegal Assessments.** — An injunction will lie against public improvements being made under a town ordinance which is illegal and void, on application of property owners who are endangered by having a cloud cast upon their titles by an apparent lien for the expenses of the improvements.³ An injunction lies in favor of a property owner to prevent a cloud being cast upon his title by an apparent lien for assessments, and to protect him from payment of assessments for the opening of a new street when the proceedings therefor, though regular upon their face, are in fact invalid, extrinsic evidence being required to show their invalidity.⁴ And though an assessment for a public improvement in a city is no lien on land until the roll is delivered to the city treasurer, as provided by the charter, equity will enjoin its enforcement, if illegal, as a cloud on title may be prevented as well as removed.⁵

they accepted the report of the commissioners appointed to assess benefits and damages within twenty days from the filing of the same with the town clerk, as required by Rev. St. Ind. 1881, 3370, 3372. *Held*, parol evidence was inadmissible to show that the trustees had actually accepted the report within the time prescribed. *Byer v. Town of Newcastle*, 124 Ind. 86; 24 N. E. 578.

¹ *Manchester v. Smyth*, 18 Am. & Eng. Corp. Cas. (N. H.) 474. See also *Barthet v. New Orleans*, (La.) 9 Am. & Eng. Corp. Cas. 509; *Ward v. Little Rock*, 41 Ark. 526; s. c. 8 Am. & Eng. Corp. Cas. 397; *Hutchinson v. State Board*, 39 N. J. Eq. 569; s. c. 8 Am. & Eng. Corp. Cas. 345; *Marini v. Graham*, 67 Cal. 130; s. c. 8 Am. & Eng. Corp. Cas. 401.

² *First Nat. Bank v. Sarlls*, (Ind. Sup.) 28 N. E. 484.

³ *Dinwiddie v. President of Rushville*, 37 Ind. 66.

⁴ *Miller v. Mayor of Mobile*, 47 Ala. 163.

⁵ *Tift v. City of Buffalo*, 7 N. Y. S. 633. See also *Newman v. City of Emporia*, 41 Kan. 583; 21 P. 593. Act Neb. approved March 1, 1881, author-

§ 727. **Protection of Streets from Obstruction and Injury.** — In a preceding section we have seen that the remedy by injunction for the protection of public interests is equally as available on application by a municipal corporation represented by its proper agents, or by a public officer, as when the action is by a tax-payer.¹ Accordingly, where a municipality has taken private lands for public purposes under the exercise of the right of eminent domain, it is entitled to an injunction against the original owner to restrain him from closing up the street, upon tendering him the amount of damages awarded in the condemnation proceedings.² But an injunction will not be granted at the suit of a municipal corporation to prevent private owners of property from erecting buildings and making other improvements thereon, when such municipal authorities have only taken the initiatory steps for condemning such property for street purposes, and have not yet complied with the terms and requirements of the statute. Such corporation will be required to show some vested right, either legal or equitable, which is likely to be injured by the proposed action of the property owners, and without such showing is not entitled to the aid of equity.³ And where municipal authorities are attempting to encroach upon the property of a private citizen under pretence of preventing obstructions in streets and alleys, they may be enjoined.⁴ So a private corporation having vested rights and easements in the streets of a city, such as that enjoyed by a gas company in the charter or under a contract with a city, may have

izes the mayor and council of cities of the first class "to levy and collect special taxes and assessments upon the lots and pieces of ground adjacent to and abutting on the street, or avenue, thus in whole or in part graded," etc. *Held*, that a petition for an injunction denying that there was "any street laid out by said city or any grading done by or in pursuance of any ordinance or direction of said city, or any grading done whatever, and that the lots of said plaintiff hereinbefore described were neither adjacent to nor abutting upon the street graded," stated a cause of action, such tax being not merely irregular but absolutely void, and liable to cloud plaintiff's title. *Tousalin v. City of Omaha*, 25 Neb. 817; 41 N. W. 796; *Hamilton v. Same*, 25 Neb. 826; 41 N. W. 799.

¹ *Supra*, § 685.

² *Jersey City v. Fitzpatrick*, 3 Stew. (N. J.) 97. See also *Burlington v. Schwarzman*, 52 Conn. 181; s. c. 52 Am. Rep. 571.

³ *New York v. Mapes*, 6 Johns. Ch. 46.

⁴ *Dudley v. Trustees*, 12 B. Mon. 610. But equity will not interfere when a question of right in the city to make the appropriations is disputed and doubtful. *Bass v. City of Shakopee*, 27 Minn. 250.

the municipal corporation enjoined from interfering with such right when such interference would result in irreparable damage.¹ But the fact that a municipal officer has directed a party to remove obstructions upon a proposed route of a highway over his land will not of itself warrant an injunction against the municipality. It must also appear that the municipal corporation claims the right, and is about to proceed to open a highway over his lands without, in fact, having the legal right to do so.²

§ 728. **Same — Other Municipal Acts entitling Individuals to Relief.** — So it is seen from many of the illustrations here and elsewhere given that the jurisdiction to restrain by injunction is not confined to illegal taxation and appropriations of funds, but may be exercised to restrain other acts injurious to individuals.³ And an injunction will lie restraining a city from interference with the use of property which has not been lawfully ascertained and declared to be a nuisance.⁴ So it will enjoin a city from proceeding, without authority of law, to inflict an irreparable injury on lots owned by the complainant.⁵ And where a municipality deliberately enters upon a scheme of drainage, in pursuance of which it will collect water from a large area, and by artificial means cast it upon private property, through which the land from which the water is to be collected would not otherwise be drained, it will be enjoined.⁶ But a city will not be restrained from making drains and culverts made necessary by altering grades of

¹ *City of Quincy v. Bull*, 106 Ill. 337; *City of Atlanta v. Gate City G. L. Co.*, 71 Ga. 106. See also *Cicero Lumber Co. v. Town of Cicero*, 51 N. E. 758; 176 Ill. 9; 42 L. R. A. 696.

² *Weiss v. Jackson Co.*, 9 Or. 470.

³ *Gartside v. St. Louis*, 43 Ill. 47; *Oakley v. Williamsburgh*, 6 Paige (N. Y.), 262; *Chicago, etc. R. Co. v. Frary*, 22 Ill. 37; *Central R. Co. v. McLean Co.*, 17 Ill. 291; *Smith v. Bangs*, 15 Ill. 400; *Griswold v. Brega*, 160 Ill. 490; *Bristol Door & Lumber Co. v. City of Bristol*, (Va.) 33 S. E. 588; *Northern Pac. R. Co. v. City of Spokane*, (C. C.) 52 F. 428; *City of Los Angeles v. Los Angeles City Water Co.*, 57 P. 210; 124 Cal. 368.

⁴ *City of Denver v. Mullen*, 7 Col. 345; 8 P. 673.

⁵ *Griffing v. Gibb*, 2 Black, 519. See also *Folley v. City of Passaic*, 26 N. J. Eq. 216; *Village of Itasca v. Schroeder*, 182 Ill. 192; 55 N. E. 50. But one cannot have a municipal corporation enjoined from changing the grade of a street, where he shows no substantial damages. *Kokomo v. Mahan*, 100 Ind. 242.

⁶ *Soule v. City of Passaic*, 47 N. J. Eq. 28; 20 A. 346.

streets because a flow of surface water on abutting premises will be thereby incurred.¹

§ 729. **Essentials of Relief against Street Improvements.** — In considering the question of granting relief to individuals alleged to be specially injured by reason of street improvements, it is important to bear in mind the general rule that courts of equity will not interfere to prevent municipal authorities from making illegal use of their powers, nor restrain them from attempted enforcement of unauthorized municipal regulations or ordinances, unless it should become necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by extrinsic evidence.² And to warrant relief by injunction against municipal authorities for proceeding to open a street over a complainant's land, it must be clearly shown that the proceedings are illegal and are had under a claim of right set up by the municipal corporation; otherwise the remedy is against the municipal officers individually.³ But it is well established that an injunction will lie to restrain a town from taking or injuring one's land for the purpose of opening and constructing streets and alleys without having the property lawfully condemned, and compensation ascertained and paid or tendered in the manner prescribed by law.⁴ A city cannot, however, be enjoined from improving its streets by an abutting property owner on the ground that the work is being defectively done.⁵ Nor on the ground that the work will necessitate a special tax on the abutting property, where no such tax has been levied, and no act done showing an intention to levy it, and where the ordinance under which the

¹ *Heth v. City of Fond du Lac*, 63 Wis. 228; s. c. 7 Am. & Eng. Corp. Cas. 504; *Paine v. Trustees, etc. of Delhi*, 116 N. Y. 224; 22 N. E. 405; *Waters v. Bay View*, 61 Wis. 642; *Turner v. Dartmouth*, 13 Allen (Mass.), 291; *Flagg v. Worcester*, 13 Gray (Mass.), 601.

² *Brown v. Trustees of Catlettsburg*, 11 Bush (Ky.), 435. See *Clapp v. City of Spokane*, (C. C.) 53 F. 515; *Pratt v. New York & H. R. R. Co.*, (Sup.) 35 N. Y. S. 83; *City of Walla Walla v. Walla Walla Water Co.*, 19 S. Ct. 77; 172 U. S. 1.

³ *Weiss v. Jackson Co.*, 9 Or. 470.

⁴ See *Mason City, etc. Co. v. Mason*, 23 W. Va. 211; *Pierpont v. Harrisville*, 9 W. Va. 215; *Gardner v. Newburg*, 2 Johns. Ch. (N. Y.) 162; *Lafayette v. Bush*, 19 Ind. 326; *Anderson v. Harvey's Heirs*, 10 Grat. (Va.) 389; *McMillen v. Ferrell*, 7 W. Va. 223; *Eidemuller v. Wyandotte City*, 2 Dill. (U. S.) 376; *Sower v. Philadelphia*, 35 Pa. St. 231.

⁵ *Dever v. City of Junction City*, 45 Kan. 417; 25 P. 861.

work is being done makes no provision for any assessment against the abutting property.¹ Nor is a lot-owner entitled to an injunction against the narrowing by the authorities of the town of a sidewalk laid in front of his lot, unless he shows that irreparable injury will result to him therefrom.²

§ 730. **Same Subject.** — An injunction is properly granted against municipal officers who are threatening the removal of complainants' buildings upon the ground that they encroach upon a street, when complainants have been in uninterrupted possession for more than twenty years under claim of legal title. Such injunction should restrain interference until the question of title may be determined at law.³ On like principles a property owner may restrain municipal authorities from constructing pavements upon his land without the institution of condemnation proceedings for that purpose.⁴ And the owner of property abutting on a street will be entitled to an injunction restraining the municipal authorities from authorizing the owner of adjoining lots to reduce the width of the street by encroachment thereon.⁵ But the proceedings of a municipal corporation in the matter of opening a street, when it has complied with all the statutory provisions, will not be enjoined upon mere general allegations in a bill, upon complainant's belief that there has been collusion on the part of the corporate authorities in connection with the proceedings.⁶

§ 731. **Where Contractor Proper Party Defendant.** — Where municipal authorities acting within the authority conferred upon them by law have entered into a contract to have a public street graded,

¹ *Dever v. City of Junction City*, 45 Kan. 417; 25 P. 861.

² *Town of Marion v. Skillman*, 127 Ind. 130; 26 N. E. 676. See also *Strauss v. City of Dallas*, 73 Tex. 649; 11 S. W. 872. A bill to enjoin city authorities from tearing up a sidewalk in front of complainant's premises, and replacing the same by a new one, on the ground that, with slight repairs, the old one would answer for several years, and the change would burden the citizens with heavy taxes and assessments, which fails to show whether the city is incorporated, and makes no reference to its charter, is defective and obnoxious to a demurrer. *Brush v. City of Carbondale*, 78 Ill. 74.

³ *Manchester Cotton Mills v. Town of Manchester*, 25 Grat. 825.

⁴ *Pierpoint v. Town of Harrisville*, 9 West Va. 215. See also *Uren v. Walsh*, 57 Wis. 98. It should be alleged in the bill and established at the hearing that the property has never been granted for street purposes, and that there has been no implied dedication. *Faust v. City of Huntington*, 91 Ind. 493. Compare *Bolton v. McShane*, 67 Iowa, 207.

⁵ *Mose v. Pittsburgh, Ft. Wayne, & C. R. Co.*, 21 Ill. 516.

⁶ *Champlin v. Mayor*, 3 Paige, 573.

a property owner upon the street to be graded cannot maintain an action against the city to have the contractor enjoined from violating his contract. If the contractor exceed his authority and duty under the contract and inflict injuries to complainant, his remedy is against the contractor either at law or in equity, according to the circumstances of the case.¹

¹ *McCaffrey v. McCabe*, 4 Abb. Pr. 57 ; s. c. 13 How. Pr. 275.

CHAPTER XVII

PERTAINING TO PRIVATE CORPORATIONS.

I. ACTIONS BY MEMBERS AND SHAREHOLDERS.

A. General Principles governing the Right.

B. Matters warranting Relief.

II. PERTAINING TO INTERESTS OF THIRD PARTIES IN MANAGEMENT OF CORPORATE AFFAIRS.

I. ACTIONS BY MEMBERS AND SHAREHOLDERS.

A. GENERAL PRINCIPLES GOVERNING THE RIGHT.

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| <p>§ 732. Interest represented by Complainant as Member of a Corporate Body.</p> <p>733. Basis of Equitable Jurisdiction.</p> <p>734. The General Rule as to <i>ultra vires</i> Act.</p> <p>735. Constitutional Questions not adjudicated.</p> <p>736. <i>Bona fide intra vires</i> Acts of Majority not restrained.</p> <p>737. No Injunction unless Injury to Complainant's Interest shown.</p> <p>738. Director or other Officer may sue as Stockholder.</p> <p>739. Demand upon Corporation.</p> <p>740. Further Qualifications of the Right.</p> <p>741. When there should be no Delay.</p> <p>742. Of the Relations sustained by Various Parties in Such Actions.</p> <p>743. What constitutes Demand — What excuses.</p> <p>744. To what Extent Corporate Elections interfered with.</p> <p>745. Title to Corporate Office only inquired into as incident to other Relief.</p> | <p>§ 746. Diligence in seeking Relief — Plaintiff required to be without Fault.</p> <p>747. Action must be brought in Good Faith — Connivance of Assignor in Fraud no Bar.</p> <p>748. The Immediate Plaintiff must not be personally disqualified.</p> <p>749. Not barred by Acquiescence in other Wrongful Acts.</p> <p>750. When Relief refused in View of Subsequent Ratification by Corporation.</p> <p>751. Equitable Owner may sue.</p> <p>752. Summary of Principles governing the Suit of Shareholders.</p> <p>753. Jurisdiction in Actions involving Foreign Corporations.</p> <p>754. Disclosure of Secrets.</p> <p>755. Pertaining to Voluntary Associations.</p> <p>756. Same — Expulsion of Members.</p> <p>757. Public Considerations in granting and refusing Relief.</p> <p>758. Not granted where Effect would be equivalent to Dissolution of the Corporation.</p> |
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§ 732. Interest represented by Complainant as Member of a Corporate Body. — Since a corporation cannot sue in equity except as the representative of the stockholders, if they are without equity, they cannot through the corporate organization, or in

its name, obtain relief either for their individual or for the collective interest.¹ There is nothing peculiar in the relations, rights, and resulting remedies between a corporation in the hands of its harmonious and non-derelict board of managers and subordinate agents and third parties. The ordinary remedies, legal and equitable, are available as in the case of other principals and agents. Hence it is impracticable and irrelevant to here enter into a discussion of the principles of remedial justice except so far as they apply to cases growing out of the inability or refusal of the constituted corporate government to subserve and protect constituent corporate interests.

§ 733. **Basis of Equitable Jurisdiction.** — In protecting and shielding by preventive remedies against contemplated and threatened wrongs, and by compulsory accounting by corporate agents for past wrongs, to collective rights and interests, courts of equity find the most frequent occasion for the exercise of jurisdiction over private corporations. The real incentive to resorting to a court of equity in these cases, usually, is the private interest of the party suing.² The principle on which a simple shareholder is allowed to sue in equity is, that there is no legal remedy available, and that where there is a wrong a party will not be left without a remedy, if it be in the power of a court of equity to furnish one.³ But this principle cannot be invoked where the

¹ *Arkansas Riv. L. T. & C. Co. v. F. L. & T. Co.*, 13 Col. 587; 22 P. 954.

² "True, the immediate plaintiff represents not only his individual interest, but he represents or may represent the individual interests of all other members who see fit to join him. Sometimes it has been said that he represents the aggregate interest; but this view is erroneous. In a court of equity the aggregate membership interest is identified with that of the corporate entity. Yet why must the corporation be made a party as is uniformly held? Why may a single member sue all others in this form to prevent *ultra vires* acts? Clearly, because the interest he represents is an individual interest, or an aggregation of individual interests, which is a different thing from the unified collective interest. If it were the latter, then every member must join him to give him a standing in court. When the proposition that the plaintiff represents the corporation is advanced, it is based on the requirement that he must show the corporation is unable or unwilling to proceed; and the answer is that in this form of equitable action the corporation itself does not represent but is the aggregate body, whose *duty* it is to protect individual interests, and whose *right* it is to protect itself." Spelling, *Priv. Corp.* § 613.

³ *Bill v. Western Un. Tel. Co.*, 16 Fed. Rep. 14; *Hersey v. Veazie*, 24 Me. 11; *Foss v. Harbottle*, 2 Hare, 495; *Re London, etc. Discount Co.*, L. R. 1 Eq. 277. A statute providing that, where corporations are acting outside their

corporation is both willing and able to proceed; and it will never be presumed either that it is unable or unwilling. Where, however, the connection of the defaulting agent has become severed, if the corporation should then refuse to proceed, a member would still have a right of action. The corporation would necessarily be made a defendant, but only nominally such. In this respect the action differs from that for the enforcement of a right against the corporation, as a real party defendant. In the latter case, though the agents were necessary, still, they would be only nominal parties defendant.¹

§ 734. **The General Rule as to ultra vires Act.** — A court of equity has jurisdiction, at the instance of stockholders in a corporation, to restrain the corporation and those who have control and management thereof, from acts tending to the destruction of its franchises, from violations of the charter, from misuses or misappropriations of the corporate powers or property, and from other acts prejudicial to the stockholders amounting to a breach of trust.² Neither the directors nor a majority of the stock-

franchises, the court "shall," by injunction, at the suit of private parties or other corporations, restrain such injurious acts, is not mandatory, but is subject to the rule that a proper case for an injunction must be first made. *Becker v. Lebanon & M. Ry. Co.*, (Pa.) 41 A. 612; 43 W. N. C. 229. A stockholder cannot obtain an injunction to prevent a slander upon the title of the corporation, there being a complete legal remedy in an action for damages. *Langdon v. Hillside C. & I. Co.*, 41 F. 609. See also *Thomas v. Mus. Mut. P. Un.*, 121 N. Y. 45; 24 N. E. 24; *Rogers v. Phelps*, 9 N. Y. S. 886; 56 Hun, 649.

¹ Spelling on Priv. Corp. § 613.

² *Pond v. Vermont Valley R. R. Co.*, 12 Blatchf. 280; *White v. Wood*, 13 N. Y. S. 631; *Kean v. Johnson*, 9 N. J. Eq. 1 Stock. 401; *Pickering v. Stephenson*, L. R. 14 Eq. 322; *Salomons v. Laing*, 12 Beav. 339; *Colman v. Eastern Counties R. Co.*, 10 Beav. 339; *Hutton v. Scarborough Cliff Hotel Co.*, 13 W. R. 631, affirming s. c. 13 W. R. 574; 2 Drew. & Sm. 514; *Kernahan v. Williams*, L. R. 6 Eq. 228; *McDonnell v. Grand Canal Co.*, 3 Ir. Ch. 578; *Cherokee Iron Co. v. Jones*, 52 Ga. 276; *Mansell v. Midland R. Co.*, 1 Hen. & M. 130; *Beman v. Rufford*, 6 Eng. Law & Eq. R. 106; *Hall v. Lay*, 59 N. Y. S. 638; 27 Misc. Rep. 602. See *Becker v. Railway Co.*, 188 Pa. St. 484; *Supreme Lodge, Order of the Golden Chain, v. Simering*, 88 Md. 276; *Erin Tp. v. Plank-Road Co.*, 115 Mich. 465; *Sternberg v. Wolff*, 56 N. J. Eq. 389. In *Pickering v. Stephenson*, 14 Eq. L. R. 322, it was said: "It is not a mere canon of English municipal law, but a great and broad principle, which must be taken (in the absence of proof to the contrary) as part of any given system of jurisprudence, that the governing body of a corporation which is a trading partnership — that is to say, the ultimate authority within the society itself — cannot, in general, use the funds of the community for any purpose other than those for which they were contributed. Therefore the special powers given to such ultimate authority —

holders can direct the corporate enterprise to objects foreign to those specified or implied in the terms of the articles or charter under which the corporation was formed, against the dissent of stockholders; and where such diversion or deviation is attempted, a dissenting minority, however small, will be entitled to an injunction to arrest the same.¹ But courts of equity, in exercising jurisdiction to prevent companies intrusted with large powers by the legislature, acting in a manner prejudicial to the rights of individuals on the one hand, will, on the other, be careful not to assist persons in availing themselves of any omission in such powers for the purpose of giving effect to exorbitant claims against the companies.²

§ 735. **Constitutional Questions not adjudicated.**—There is a well-known reluctance on the part of courts of equity to enter upon an examination of questions contested upon constitutional grounds prior to an adjudication of such questions in the higher courts of law; and an injunction will not be granted to restrain the executive officers or agents of a society chartered to enforce laws of the state from exercising their charter powers, upon the ground that the grant of powers is unconstitutional, or that the powers are oppressively exercised.³

§ 736. **Bona fide intra vires Acts of Majority not restrained.**—

whether it be the directors, or a general council, or a majority at a general meeting, by the statutes or other constituent documents of the association (however absolute in terms)—are always to be construed as subject to a paramount and inherent restriction that they are to be exercised in subjection to the special purposes of the original bond of association.” The jurisdiction in equity to afford protection by injunction and otherwise extends to ecclesiastical as well as to lay corporations. *Atty.-Gen. v. St. John’s Hospital*, 2 De G. J. & S. 621; *Parr v. Atty.-Gen.*, 8 Cl. & Fin. 409.

¹ *Beman v. Rufford*, 1 Sim. N. S. 564; *Kean v. Johnson*, 1 Stock. (N. J.) 401; *Union Water Co. v. Kean*, (N. J. Ch.) 27 A. 1015; *River Dun Navigation Co. v. North Midland Ry. Co.*, 1 Railw. Cas. 135; *Wiswell v. First, etc. Church*, 14 Ohio St. 31; *Sears v. Hotchkiss*, 25 Conn. 171; *Simpson v. Westminster P. H. Co.*, 8 H. L. 717; *Smith v. Bangs*, 15 Ill. 400; *Ill., etc. R. Co. v. Cork*, 29 Ill. 237; *Mozley v. Alston*, 1 Ph. 798; *Stewart v. Erie, etc. Trans. Co.*, 17 Minn. 372; *World Mut. Ins. Co. v. Bund “Hand in Hand,”* 47 How. Pr. (N. Y.) 37; *Gifford v. New Jersey, etc. R. Co.*, 2 Stock. (N. J.) 171; *Archer v. American Water Works Co.*, (N. J. Ch.) 24 A. 508. Relief granted in favor of member and against directors of building and loan association in *Amer. v. Union Bldg. & Loan Ass’n*, (N. J. Ch.) 24 A. 552.

² *Bell v. Hull & Selby Railw. Co.*, 1 Railw. Cas. 616.

³ *Davis v. American Soc. for Prevention of Cruelty to Animals*, 6 Daly (N. Y.), 81.

Where the preventive relief sought is not against the directors but against the majority, the contemplated acts must be clearly shown to be unauthorized by the company's charter, or contrary to general law. It is not enough merely to show that it will be injudicious; as, for instance, that it will result in loss, or involve the corporation in expensive and vexatious litigation. It is for the majority and not the individual stockholders to say how the authorized powers shall be exercised and in what authorized enterprises the funds shall be invested.¹ Accordingly, where a corporation has the power of doing or not doing an act, at its discretion, equity will not interfere with the lawful exercise of the discretion. It will not interpose until fraud is shown.² Therefore, where a shareholder in a water company, at his own expense and for his own benefit, has built a system of pipes, etc., suitable for an extension of the company's plant, he has a right to sell the same to the company; and the fact that at a meeting of the shareholders he voted his shares in favor of the purchase does not make the transaction a fraud upon the minority shareholders who were opposed thereto, and they cannot enjoin the issuance of the company's stock and bonds in payment therefor, without showing actual fraud, or that the price paid was so exorbitant as to necessarily lead to the inference of fraud.³ And

¹ *Spelling, Priv. Corp.* § 594. In *Converse v. Hood*, 149 Mass. 471; 21 N. E. 878, the act sought to be prevented was the undertaking by the defendant corporation of the manufacture of rubber boots and shoes. The action was brought to restrain stockholders from voting for and the corporation from carrying on a business authorized by its charter, on the ground that by so doing it would infringe the rights of another corporation and expose itself to litigation therefor. The supreme court affirmed the decision of the court below, denying the prayer of the bill. See also *McIntosh v. Flint & P. M. R. Co.*, 32 F. 350; *St. Croix Lumber Co. v. Mittlestadt*, 43 Minn. 91; 44 N. W. 1079; *Semmes v. Columbus*, 19 Ga. 471; *Taylor v. Scranton Poor Dist. (Com. Pl.)* 2 Lack. Leg. N. 205; *Carmien v. Cornell*, (Ind. Sup.) 47 N. E. 216; *Emerson v. South Fork Irr. & Imp. Co.*, 53 P. 756; *Sternberg v. Wolff*, 39 A. 397; 39 L. R. A. 762.

² *Semmes v. Columbus*, 19 Ga. 471.

³ Reversing 5 N. Y. S. 124. *Gamble v. Queen's County Water Co.*, 123 N. Y. 91; 25 N. E. 201. Threats by an officer or member of the New York Stock Exchange to pay claims presented by members of the Exchange against an insolvent and suspended member, whose seat had been sold by the Exchange, which claims are fraudulent, and not within the legal preferences established by the constitution of the Exchange, are not sufficient to authorize a preliminary injunction restraining such payment, as the Exchange has a right to pay proper claims, and it is to be presumed that its action will be legal. *Stonebridge v. Smith*, 55 N. Y. Superior Court, 294.

where the matters complained of strictly relate to the internal management of a company, even though the course adopted is not within the terms of the instrument of foundation, the court will not interfere. But if the matters complained of are plainly beyond the powers of the company, and are inconsistent with the object for which the company was constituted, the court will interfere at the instance of the minority to prevent their being carried out.¹

§ 737. **No Injunction unless Injury to Complainant's Interest shown.** — While an injunction will always be granted at the suit of members or shareholders of a corporation, to restrain its officers and agents from doing *ultra vires* or illegal acts whereby an injury is threatened to their interest in the corporate enterprise, no matter in what the unwarranted attempt consists, yet not only must a clear excess of corporate power be shown, and an attempt to carry out an enterprise foreign to the purposes for which the corporation was formed, but it must also be shown that if consummated it will affect prejudicially a substantial right of the shareholder as such.² Nor will equity interfere if by doing so the corporate business would be considerably embarrassed where the damage is slight,³ or where damages at law are a sufficient or proper remedy,⁴ or the wrong is of a temporary character.⁵ Nor will an injunction be granted merely to prevent the officers or managing agents from violating criminal statutes. Thus, an

¹ Gregory v. Patchett, 10 Jur. n. s. 1118.

² Spelling, Priv. Corp. §§ 615, 616; Jones v. Mayor, etc. of Little Rock, 25 Ark. 301; Lane v. Schomp, 20 N. J. Eq. 82; Stockton v. American Tobacco Co., (N. J. Ch.) 36 A. 971; Miller v. American Tobacco Co., (N. J. Eq.) 42 A. 1117; Union Pacific, etc. R. R. Co. v. Lincoln County, 3 Dill. (U. S. C. C.) 300; St. Louis v. Weber, 44 Mo. 547; Robinson v. Chartered Bank, L. R. 1 Eq. 32; Bach v. Pacific Mail Steamship Co., 12 Abb. Pr. (N. Y.) n. s. 373. Unless an actual injury results to a private individual himself from the excessive exercise of the powers of a company, he is not entitled to an injunction. Ware v. Regents Canal Co., 5 Jur. n. s. 25. An injunction will not lie to prevent the board of directors of a corporation from merely allowing as correct a fraudulent account against the corporation. Rogers v. Lafayette Agricultural Works, 52 Ind. 296. The court will not assume that a stock exchange will refuse to recognize plaintiff's claim or one whose right is inferior to plaintiff's, and therefore will not issue an injunction in advance of any necessity. McCabe v. Emmons, 51 N. Y. Super. Ct. 219.

³ Warden of Dover Harbor v. Eastern Railw. Co., 9 Hare, 497.

⁴ Turner v. Blamire, 1 Drew. 409.

⁵ Standish v. Mayor of Liverpool, 1 Drew. 1. See also Wood v. Charing Cross Railw. Co., 33 Beav. 290.

injunction was refused where sought by a stockholder in an incorporated fair association to restrain it and its officers from permitting gambling on the fair grounds, it not appearing that either plaintiff or the company was pecuniarily injured by such permission.¹ And the relief will be refused if the injury feared is not actual and impending but only conjectural.²

§ 738. **Director or other Officer may sue as Stockholder.** — A director or other officer may maintain an action for an accounting and an injunction in the name of the corporation without the authority of the board of trustees, or against its express direction, with the same effect as other stockholders.³ And where the board of directors are themselves the wrong-doers, or they refuse to restrain or redress the wrong; or where one board, claiming to be directors, are the wrong-doers, and another board, claiming and alleging to be the legal directors, refuse to prosecute, stockholders may file the bill.⁴ On a similar principle a director of a company can, if qualified, sustain an action in his own name against the other directors, on the ground of individual injury to himself, for an injunction to restrain them from wrongfully excluding him from acting as a director.⁵ But in an action brought

¹ *Cope v. District Fair Assoc.*, 99 Ill. 489; s. c. 39 Am. Rep. 30.

² *Thomas v. Musical Mut. Protective Union*, 121 N. Y. 45; 24 N. E. 24. A stockholder in a railroad company sought by injunction to restrain the company from granting free passes to the members of the general assembly and to state officers, and it was not found by the court that the company contemplated doing this, but only that it had given such passes to some former members of the general assembly, and to some former state officers; and that the petitioner was apprehensive that it would grant such passes to members of the general assembly and the state officers then about to be elected. *Held*, that there was not sufficient ground for interference by injunction. *Goodwin v. New York, etc. R. R. Co.*, 43 Conn. 494.

³ So held in a case where a majority of the directors were shown to have wrongfully converted corporate funds and threatened to convert others, and where the neglect of the board to sue and its resolution to discontinue the suit already brought were simply acts in furtherance of an unlawful design. *Recamier Mfg. Co. v. Seymour*, 24 N. Y. St. R. 54; 5 N. Y. Supp. 648.

⁴ *Pond v. Vermont Valley R. R. Co.*, 12 Blatchf. 280.

⁵ *Pulbrook v. Richmond Cons. M. Co.*, L. R. 9 Ch. Div. 610. In *Mair v. Himalaya Tea Company*, L. R. 1 Eq. 411, it was held that the duties of the agent of a limited company being in the nature of personal service, and as such incapable of being enforced in equity, the court refused to restrain the directors from acting upon or enforcing the resignation of A., whose management and agency was made a prominent condition in the prospectus on the formation of the company, and expressly provided for by the articles of association. See also *Inderwick v. Snell*, 2 Mac. & G. 216; 2 H. & T. 412.

by a trustee of a corporation against his co-trustees, to compel them to account for and pay to the corporation the company's funds which he alleged them to have misappropriated, an injunction will not be granted restraining the defendants from acting in the discharge of their usual duties in reference to the operations of the corporation and in managing its affairs, when the action is not brought to procure a dissolution of the corporation, or the appointment of a receiver, or a distribution of its assets, and where the plaintiff contemplates a continuance of the corporation and of its legitimate operations.¹

§ 739. **Demand upon Corporation.** — In actions between members, as well as where the agents or third parties are complained against, it must be made to appear to the court that the corporation is unable or unwilling, in the hands of its constituted government, to protect the complaining member; and the best and only evidence of such unwillingness or inability is a demand upon the managing agents, or evidence of such facts as show a demand to be excusable or unnecessary.² A suit by individual shareholders of an incorporated company is not maintainable where the plaintiffs have the means of procuring the institution of a suit for the same remedy in the name of the corporation; and this rule applies equally whether the subject of complaint be an act or transaction

¹ *Latimer v. Eddy*, 46 Barb. (N. Y.) 61.

² *Dunphy v. Trav. Newsp. Ass'n*, 146 Mass. 495; 16 N. E. 426. In this case it was alleged in a complainant's bill that the directors were under the influence of the president; that they had abdicated their proper functions and surrendered the entire control of the affairs of the corporation to him, three of them not being *bona fide* stockholders, but having been made such by the voluntary transfer of stock to them by the president to enable them to act as such. The court held that it was necessary under these circumstances for plaintiff to show demand of the board of directors to commence action against the president before bringing suit. See also *Rogers v. Lafayette Agr. Wks.*, 52 Ind. 296. The same view was taken where the complaint showed such a state of affairs as would have rendered the making a demand but an idle ceremony. *County of Tazewell v. Farmers' Loan Trust Co.*, 12 Fed. Rep. 752. See also *Board of Tippecanoe County v. Lafayette, etc. R. Co.*, 50 Ind. 85; *Brower v. Boston Theatre Co.*, 104 Mass. 378; *Kelsey v. Sargent*, 40 Hun, 150; *Currier v. N. Y., etc. R. R. Co.*, 35 Hun, 355. A denial in the answer of any trust relation with respect to the subject of the action was held to be a waiver of the objection that no demand had been made previous to bringing the suit. *Parrott v. Byers*, 40 Cal. 614. See also *Brinkerhoff v. Bostwick*, 88 N. Y. 52; *Ramsay v. Gould*, 57 Barb. 398; *Fisher v. Andrews*, 37 Hun, 176; *Doud v. Wis., etc. R. Co.*, 65 Wis. 108; 25 N. W. 533; *Pond v. Vermont, etc. R. Co.*, 12 Blatchf. 280; *Mussina v. Goldwaithe*, 34 Tex. 125.

merely voidable at the discretion of a majority, or absolutely illegal, and incapable of being confirmed.¹ The primary and best evidence of the unwillingness of the corporation is proof of a demand upon the proper agents and their refusal. In some way, it must be made to appear that the proper agents or officers are either unable or unwilling to bring the suit on behalf of the corporation.²

§ 740. **Further Qualifications of the Right.** — In order, however, to entitle a stockholder to institute and maintain a suit in equity to redress a corporate injury committed *infra vires* against a solvent corporation in the full exercise of its franchises and carrying on its corporate business, it must appear not only that the directors are disabled by their misconduct to sue, or that they have wrongfully refused to do so upon proper demand; but when the matter will admit of the necessary delay, and it is practicable to call upon the stockholders to act, this must also be done.³ If all the

¹ *Mozley v. Alston*, 1 Ph. 790.

² *Hersey v. Veazie*, 24 Me. 9; *Cogswell v. Bull*, 39 Cal. 324; *Hodgson v. Duluth H. & D. R. Co.*, (Minn.) 49 N. W. 197; *Boyd v. Sims*, 3 Pickle, (Tenn.) 771; 11 S. W. 948; *McMurray v. Northern Ry. Co.*, 22 Grant (U. C.) Ch. 476; *Moore v. Silver Valley Min. Co.*, 104 N. C. 534; 10 S. E. 679; *Holton v. New Castle, etc. R. Co.*, (Pa.) 20 A. 937; *Memphis City v. Dean*, 8 Wall. 73. To the same effect see *Greaves v. Gouge*, 69 N. Y. 154; *Morgan v. R. R. Co.*, 1 Woods, 15; *Newby v. Oregon, etc. R. Co.*, 1 Sawy. 63; *Samuel v. Holladay*, 1 Woolw. 414; *Wilkie v. Rochester, etc. Ry. Co.*, 12 Hun, 242; *Black v. Huggins*, 2 Tenn. Ch. 780; *Ware v. Bazemore*, 58 Ga. 316; *Talbot v. Scripps*, 31 Mich. 268; *Lothrop v. Stedman*, 42 Conn. 583; *Hawes v. Oakland*, 104 U. S. 450, 460. In action by a stockholder against a railroad corporation and its directors, the bill alleged a violation of agreements between the corporation and others, the use of its credit for unauthorized purposes, the wasting and diversion of its assets from their proper purpose, and the aiding in the construction of a competitive line. It was averred that protests were made against such action, but it was not alleged that they were made by or on behalf of complainant or other stockholder. It was held that the action being founded on rights which the corporation might properly assert, a preliminary injunction would not be granted, since it did not appear what particular efforts had been made by complainant to secure action by the directors in respect to the matters complained of, nor the causes for his failure to obtain relief from them. *Weidenfeld v. Alleghany & K. R. Co.*, 47 F. 11.

³ *Rathbone v. Gas Co.*, 21 W. Va. 798; 8 S. E. 570; *Byers v. Rollins*, 26 Am. & Eng. Cor. Cas. 117, n.; *Nathan v. Tompkins*, 19 Am. & Eng. Cor. Cas. 336; *Dunphy v. Trav. Newsp. Ass'n*, Id. 346; *Rothwell v. Robinson*, 21 Id. 408, n., to p. 409; *Lang Syne Min. Co. v. Ross*, 21 Id. 410; *Taylor v. Holmes*, 21 Id. 419. Where a stockholder of an insolvent corporation in the hands of a receiver desires to sue the former directors for a loss incurred by the corporation on account of their malfeasance, it is not enough to show the failure or

directors have resigned or cannot be found, a previous demand is impossible and a sufficient reason exists for not making it.¹ But the general rule first above stated has been held not to apply where a remedy is sought, not for the corporation, but for the shareholders themselves, though it is difficult to see a distinction between the one case and the other.²

§ 741. *When there should be no Delay.* — A refusal in view of possible subsequent ratification by the corporation is only proper in occasional instances of wrongful acts already done. And the reason for delay, on the ground that the stockholders should have an opportunity to act in the matter, fails when it is shown that, from any cause, they are either unable or unwilling to act. There is, in such case, not only no reason for delay, but a very strong one for giving immediate relief; for it frequently happens that the wrongful acts of the majority are the very matters com-

refusal of the receiver to bring the action, but he must, as the representative of the corporation, be made a party defendant to the suit. *Porter v. Sabin*, 35 Fed. Rep. 475. See *Ayer v. Seymour*, 5 N. Y. Supp. 650, where injunction was granted and receiver *pendente lite* appointed in a case of fraudulent combination and deprivation of rights of shareholder. *Davis v. Gemmell*, 70 Md. 358; demand excused because officers themselves guilty of the wrong-doing. *Boyd v. Sims*, 3 Pickle (Tenn.), 771; 11 S. W. 948, where it was held that a stockholder could not, without a demand upon the directors and their refusal, sue another company charged with wrongfully interfering with the rights of their company, simply because a majority of their directors were stockholders to a larger extent in the defendant company than in their own, and a minority were also directors in the defendant company. *Alexander v. Searcy*, 81 Ga. 536; 8 S. E. 630, holding that the minority stockholders cannot maintain a bill to prevent a foreclosure of a mortgage where the only ground alleged is the mismanagement of the corporation in the interest of the principal bondholders and stockholders, without also alleging a demand upon and refusal by the directors, and no excuse for not so doing is shown except that the officials were in collusion with the persons seeking the foreclosure. *East Rome Town Co. v. Brower*, 80 Ga. 258, where it was held that the complaint did not show facts sufficient to excuse demand. And where the treasurer held a majority of the stock, that was held not to excuse a demand upon the directors to bring suit, but that it did excuse a demand upon a stockholders' meeting. *Dunphy v. Trav. Newsp. Ass'n*, 146 Mass. 495; 16 N. E. 426. See also *Rothwell v. Robinson*, 39 Minn. 1; 38 N. W. 772. Where an injunction was granted on the application of the stockholders of an incorporated company, charging that the officers of the corporation were abusing the trust, and the conduct of the officers was afterwards approved by a large majority of the stockholders, the court dissolved the injunction. *Carpenter v. Burden*, 2 Pars. (Pa.) Sel. Cas. 24.

¹ *Wilcox v. Bickel*, 11 Neb. 154; 8 N. 436.

² *Barry v. Plate-Glass Co.*, 40 F. 412; *Myers v. Scott*, 7 N. Y. S. 753; 50 Hun, 608.

plained of, or that the wrong-doers are in collusion with the majority with the object of preventing action, or that the derelict agents have constituted themselves a majority by fraudulently obtaining control of the shares.¹

§ 742. **Of the Relations sustained by Various Parties in Such Actions.** — It is plain that while the corporation is a trustee for the members, it is only technically such. Being a soulless entity, without will or conscience, it can never act or exercise a discretion except through and by its representatives. It necessarily follows that all abuses of its trust or violations of the right of members imply a dereliction of duty by its agents, and no action will lie by a shareholder in a representative capacity unless there has been an injury, or one is threatened to the collective corporate interest by and through the negligence or wrong of the agents. This observation will apply to actions based on unwarranted acts of a majority seeking to benefit themselves at the expense of the minority, or to do that which is illegal, oppressive, fraudulent, or *ultra vires*; for the majority acts only as a collective or superior agent from which all other agents of a corporation derive their authority.²

§ 743. **What constitutes Demand — What excuses.** — When it is said in any such instance that before an individual shareholder may sue he must first demand that suit be brought by the corporation or prove its refusal to sue, it is only meant that such demand shall have been made upon the managing agents or their refusal be shown.³ But the mere refusal of the corporation to bring suit will not authorize a shareholder to himself conduct such suit. Their refusal must appear to have been wrongful,

¹ *Atwool v. Merryweather*, L. R. 5 Eq. 464, note, 468; *Russell v. Wakefield W. W. Co.*, L. R. 29 Eq. 482; *Cannon v. Trask*, L. R. 20 Eq. 669; *Menier v. Hooper's Tel. Wks.*, L. R. 9 Ch. 350; *Davidson v. Grange (U. C.)* Ch. 377; *Neall v. Hill*, 16 Cal. 151; *Wright v. Oroville Min. Co.* 40 Cal. 20; *Taylor v. Miami Exp. Co.*, 5 Ohio St. 162; *Sears v. Hotchkins*, 25 Conn. 171; *Brewer v. Boston Theatre Co.*, 104 Mass. 878; *Neall v. Hill*, 16 Cal. 145. Where by fraudulently refusing to transfer stock in a corporation the officers are put in position, through the control they thereby acquire, to seriously prejudice the interests of those who are justly entitled to the transfer, and so act as to make their purpose to accomplish that prejudice apparent, the meetings they can control will be stayed by injunction until the transfers can be compelled. *Archer v. American Water Works Co.*, (N. J. Ch.) 24 A. 508.

² *Spelling, Priv. Corp.* § 612. See also *Sternberg v. Wolff*, 42 A. 1078; 56 N. J. Eq. 555.

³ *Memphis, etc. R. Co. v. Woods*, 88 Ala. 630; 7 So. 108.

and to have been by a majority of the board of directors; the refusal of the president alone is not sufficient.¹ Where, however, as is often the case, such managing agents are the parties whose wrongful conduct or default constitutes the cause of complaint, it is apparent that a demand upon them to sue themselves would be absurd, and might defeat the object of the suit. When, therefore, the complaint shows that a previous demand would, from any cause, have been useless or unavailing, it is not demurrable on the ground that it does not allege a previous demand on the corporation to bring the suit.²

¹ *Wallace v. Lincoln Sav. B'k*, 89 Tenn. 630; 15 S. W. 448; holding also that where a corporation is in the hands of a trustee in insolvency, and he declines to sue, deeming himself unauthorized, a shareholder may conduct the suit.

² *Currier v. N. Y., etc. R. R. Co.*, 35 Hun, 355; *Robinson v. Smith*, 8 Paige, 222; *Peabody v. Flint*, 6 Allen, 52; *Brewer v. Boston Theatre Co.*, 104 Mass. 378, 387; *City of Chicago v. Cameron*, 120 Ill. 447; 11 N. E. 899; *Mussina v. Goldwaithe*, 34 Tex. 125; *Nathan v. Tompkins*, 82 Ala. 437; 2 So. 747; *Pond v. Vt. Val. R. R. Co.*, 12 Blatchf. 280; *Hardon v. Newton*, 14 Blatchf. 376; *Eschweiller v. Stowell*, 78 Wis. 316; 47 N. W. 361; *Hazard v. Durant*, 11 R. I. 195; *Salomons v. Laing*, 12 Beav. 377; *Heath v. Erie Ry. Co.*, 8 Blatchf. 410; *Rogers v. Lafayette Agricultural Wks.*, 52 Ind. 296; *Deaderick v. Wilson*, 8 Baxter, (Tenn.) 108; *Moore v. Schoppert*, 22 W. Va. 282, 290. A demand will be excused where it is shown that the corporation is under the control of the defaulting directors, such demand being in that case useless. *Moyle v. Landers*, 83 Cal. 579; 23 P. 798. Where one corporation acquires a majority of the stock of a rival corporation, and a bill is filed by a stockholder of the latter company to enjoin the other company from voting in an election of directors, which fails to allege a demand and refusal upon the part of the directors of complainant's company to bring the suit in the corporate name, such failure is excused if the directors of defendant company had constituted a majority of the governing board of complainant company. *Mack v. De Bardelaben C. & I. Co.*, 90 Ala. 396; 8 So. 150. "If the facts, as alleged, show that the defendants charged with the wrong-doing, or some of them, constitute a majority of the directors or managing body at the time of commencing the suit, or that the directors, or a majority thereof, are still under the control of the wrong-doing defendants, so that a refusal of the managing body, if requested to bring a suit in the name of the corporation, may be inferred with reasonable certainty, then an action by a stockholder may be maintained without alleging or proving any notice, request, demand, or express refusal. In like manner, if the plaintiff's pleading discloses any other condition of fact which renders it reasonably certain that a suit by the corporation would be impossible, and that a demand therefor would be nugatory, the action may be maintained without averring a demand, or any other similar proceeding on the part of the stockholder plaintiff." *Pomeroy's Equity Jurisprudence*, § 1075, and cases cited in note. See also *Averill v. Barber*, 6 N. Y. S. 255; 53 Hun, 636; *Ashton v. Dashaway Ass'n*, 84 Cal. 61; 22 P. 660; 23 P. 1091; *Ives v. Smith*, 8 N. Y. S. 46; 55 Hun, 606. The

§ 744. **To what Extent Corporate Elections interfered with.** — It is now a generally received doctrine that courts of equity have jurisdiction to enjoin corporate elections; and in the exercise of their legitimate functions they have adapted their remedies to meet the requirements occasioned by the development of business interests, and the complications arising from diversities therein; and in the exercise of their powers they have assumed to control the elections of private corporations, where the principles of equity seemed to require it. This power of courts of equity has been recognized in this country, and a succession of decisions has firmly established the jurisdiction.¹ And jurisdiction will be entertained in such a case, even though the case may involve as an incidental question inquiry as to which of two boards of directors

principle governing in such cases has been thus clearly expressed: "An application by plaintiff to them (the agents) to prosecute the wrong would be an application to bring suit against themselves in the name of the corporation. So absurd a requirement cannot be imposed on plaintiff as a condition of affording relief for so clear a wrong." *Rothwell v. Robinson*, 39 Minn. 1; 38 N. W. 772, per Gilfillan, Ch. J. See also *Mussina v. Goldwaithe*, 34 Tex. 125; *March v. Eastern R. R. Co.*, 40 N. H. 548. "Where the corporate affairs are mismanaged by a majority of the directors conspiring together, a stockholder need not demand that the directors bring suit against the conspirators before suing therefor in his own name." *Wayne Pike Co. v. Hammons*, (Ind.) 27 N. E. 487.

¹ *Wood's Railway Law*, c. 141; *Wright v. Bunfy*, 11 Ind. 404; *Haight v. Day*, 1 Johns. Ch. (N. Y.) 18; *Walker v. Devereaux*, 4 Paige (N. Y.), 229 (1883); *Campbell v. Poultney*, 6 G. & J. (Md.) 94; *Hilles v. Parish*, 13 N. J. Eq. 380; *Webb v. Ridgely*, 38 Md. 364; *Morris v. Stevens*, (Pa. Sup.) 36 A. 151; 178 Pa. St. 568; *Ciancimino v. Man*, (Com. Pl. N. Y.) 20 N. Y. S. 702; *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. (U. S. C. C.) 525. In *Walker v. Devereaux*, *supra*, Chancellor Walworth said: "This court unquestionably has the power to prevent this election by an injunction operating upon the commissioners, restraining them from acting as inspectors of the election. And in a case of imperious necessity where the complainant did not know and could not ascertain the names of the other stockholders, I might consider it my duty to prevent a great and irreparable injury to him, although the effect of that interference might be to destroy the charter of the corporation. But in the exercise of such a power the court should require ample security from the complainant to pay all damages other persons might sustain by the granting of the injunction, if it should be subsequently ascertained that it was not warranted by the real facts of the case. The oath of the complainant that he is informed and believes the existence of a fact, may be sufficient ground to authorize the issuing of an injunction against a defendant who has had an opportunity to deny the allegation if it is unfounded, but it is not sufficient to justify the court in destroying or injuring the rights of others who have not had an opportunity of being heard by themselves, or by those who are under a legal obligation to protect their rights."

is the legal one.¹ But a bill in equity for an injunction cannot be maintained for the sole or main purpose of determining the question of the contested election of directors of a corporation.² Nor will equity interfere by injunction upon the complaint of a minority of the directors, to restrain a person from voting on an alleged excess of stock, which the company have taken no steps to declare void, where it does not appear that his voting would produce irreparable and permanent injury, or great and imminent danger.³ Nor is the pledgor of stock entitled to a preliminary injunction to restrain the pledgee from voting on it, the complaint not making out a case for final relief.⁴

§ 745. *Title to Corporate Office only inquired into as incident to other Relief.* — A court of equity will not entertain jurisdiction of a suit the purpose of which is merely to test the legality of an election of directors or to remove an officer of a corporation who is in actual possession; yet, when the question arises incidentally

¹ *Pond v. Vermont Valley R. R. Co.*, 12 Blatchf. (U. S. C. C.) 280.

² *New England Mut. Life Ins. Co. v. Phillips*, 141 Mass. 535; 6 N. E. 534; *Mozley v. Alston*, 1 Phill. 790; *Supreme Lodge, Order of the Golden Chain, v. Simering*, 40 A. 723; *Carmel Natural Gas & Improvement Co. v. Small* (Ind. Sup.) 47 N. E. 11; *Hooe v. Hall*, 9 Ohio Cir. Ct. R. 654; *Washington Lighting Co. v. Dimmick*, 58 N. Y. S. 682; 41 App. Div. 596. See *Delaware, L. & W. R. Co. v. Breckenridge*, 56 N. J. Eq. 595. See also *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1; *Forest v. Manchester, etc. Ry. Co.*, 4 De G. F. & J. 131; *Ramsey v. Gould*, 57 Barb. 398; *Occum Co. v. Sprague Manuf. Co.*, 34 Conn. 529; *Cent. R. R. Co. v. Collins*, 40 Ga. 582; *Camden, etc. R. R. Co. v. Elkins*, 37 N. J. Eq. 273; *Pender v. Lushington*, L. R. 6 Ch. D. 70. A railroad company in financial difficulties, with a view to compromise, placed creditors' securities and stockholders' certificates under control of a "reconstruction board" which was to act with the advice and consent of a body designated as a "voting trust," this latter body consisting of four persons named by syndicates representing different interests. This "voting trust" was to hold the legal title to the stock, and to give those who had surrendered their stock certificates that the beneficial interest was in them, devoid of the right to vote. The holder of such a certificate sought an injunction to stay or regulate an election, on the ground that so much of the scheme as vested the legal title in the voting trust was void, as placing the railroad under the control of men having no interest in its fortunes, and not the real owners of the stock. It was held that a preliminary injunction which might prevent an election should not issue. *Shelmerdine v. Welsh*, 8 Pa. Co. Ct. Rep. 330.

³ *Reed v. Jones*, 6 Wis. 680, holding also that an injunction to restrain an alleged stockholder from voting for directors does not suspend the general and ordinary business of the corporation; and therefore, under Code Wis. § 132, may be granted by the court commissioner.

⁴ *McHenry v. Jewett*, 90 N. Y. 58.

and collaterally in a suit rightfully filed for another purpose, the court will decide it. Thus, where a new board of directors elected with a view to effecting a consolidation with another corporation attempt to consummate it and a bill is filed to enjoin them, the court may and will inquire into the legality of their election.¹ So where a corporation has absolutely ceased to exist, equity may enjoin threatened acts of a person assuming to act for it.² And where four directors of the same company met together, and passed a resolution to mortgage, and did mortgage, part of the company's property, to themselves and another director, and some of the five mortgagees had ceased to be directors by being concerned in a previous contract with the company, it was held that a sale by them under the mortgage must be restrained until the hearing of the cause.³

§ 746. **Diligence in seeking Relief — Plaintiff required to be without Fault.** — To entitle a stockholder to such preventive relief, he must be diligent in applying for it.⁴ And where a stockholder has failed to discover the fraud, and neglected to bring an action to arrest further action until matters have proceeded so far that the parties liable to be injuriously affected thereby cannot be placed *in statu quo*, equity will decline to interfere.⁵ Thus, bonds having been given for subscriptions to stock, it was held that although this was not paying in the capital in accordance with the

¹ Spelling, Priv. Corp. § 596; Nathan v. Tompkins, 82 Ala. 437; 2 So. 747. See also Johnson v. Jones, 23 N. J. Eq. 216; Perry v. Tuscaloosa Cotton-Seed Oil Mill Co., 9 So. 217; Model Building & Loan Ass'n v. Patterson, (City Ct. Brook.) 34 N. Y. S. 241; 12 Misc. Rep. 400.

² Attorney-General v. Chicago & Evanston R. R. Co., 116 Ill. 520.

³ Southampton Boat Co. v. Muntz, 12 W. R. 330. See also Ciancimino v. Man, (Com. Pl. N. Y.) 20 N. Y. S. 702.

⁴ Chapman v. Mad River, etc. Co., 6 Ohio St. 120; Ffooks v. Southwestern R. Co., 1 Sm. & Gif. 142; Gray v. Chaplin, 2 Russ. 126; Gregory v. Patchett, 33 Beav. 595; Kent v. Jackson, 14 Beav. 367; Goodin v. Cincinnati, etc. Co., 18 Ohio St. 169; Watt's Appeal, 78 Pa. St. 370. In Ware v. Regents Canal Co., 3 De G. & J. 212, the chancellor said: "Upon the question whether I am to grant the injunction, I cannot avoid being influenced by the delay which has occurred in the institution of proceedings by the plaintiff, which, though not amounting to absolute proof of acquiescence, yet is calculated to throw considerable doubt upon the reality of his alleged injury, and compels me to weigh the amount of inconvenience which he will sustain by my refusal of this particular remedy against the serious consequences which might result to the company from an order which will oblige them to alter the state and condition of their works."

⁵ Walker v. Devereaux, 4 Paige Ch. (N. Y.) 229.

charter, a court of equity would not enjoin a suit on such a bond, where the company had organized and commenced business upon such bonds as part of its capital.¹ Another rule of decisive importance in all cases where equitable relief is sought also applies in this class of cases ; namely, that complainant must not be shown to be himself at fault with respect to the transaction in question, or negligent in the performance of his special duties to the corporation.²

§ 747. **Action must be brought in Good Faith — Connivance of Assignor in Fraud no Bar.** — Although it is the undoubted right of every shareholder in a company to prevent the directors from exceeding their powers, still, where it appears that the plaintiff is merely a puppet in the hands of others, not shareholders in the company, who indemnify him against the costs of the suit, the court will not interfere by interlocutory injunction.³ If the suit be brought to aid the schemes of others desiring the failure rather than the success of the business in which the corporation is engaged, it is an imposition on the court, and the action will be dismissed without regard to the rights of *bona fide* shareholders.⁴ But the immediate complainant seeking equitable relief against fraudulent acts of the majority is not debarred of the remedy by reason of the participation of his assignor therein, if he had no notice of the same prior to the assignment.⁵

¹ *Yard v. Insurance Co.*, 10 N. J. Eq. (2 Stock.) 480.

² *Hurst v. New York Produce Exchange*, 100 N. Y. 605; 3 N. E. 42. In this case injunction was refused to restrain a produce exchange from investigating charges brought by one of its members against another, under a by-law conferring the power to investigate *inter alia*, "proceedings inconsistent with just and equitable principles of trade," plaintiff having refused to pay a demand for which an action was pending against him in the courts.

³ *Fielder v. London, Brighton, & South Coast Railway Co.*, 1 H. & M. 489. See also *Stockport District Waterworks Co. v. Manchester (Mayor, etc.)*, 11 W. R. 156.

⁴ *Belmont v. Erie Ry. Co.*, 52 Barb. 637; *Waterbury v. Mer., etc. Exp. Co.*, 50 Barb. 168; *Robson v. Dodds*, L. R. 8 Eq. 301; *Ffooks v. Southwestern Ry. Co.*, 1 Sm. & G. 142; *Burt v. British, etc. Assur. Ass'n*, 4 De G. & J. 158; *Filder v. London, etc. Ry. Co.*, 1 H. & M. 489; *Forest v. Manchester, etc. Ry. Co.*, 4 De G. F. & J. 126; *Sparhawk v. Un. Pass. Ry. Co.*, 54 Pa. St. 401.

⁵ *Parson v. Joseph*, (Ala.) 8 So. 788. In this case a street railway company, in doubling its capital stock, issued to a subscriber additional shares equal in amount to what he had already received and paid for by thirty-nine acres of land. A stockholder brought a bill to cancel the additional shares, alleging himself to be a *bona fide* stockholder and that the land was overvalued fivefold,

§ 748. **The Immediate Plaintiff must not be personally disqualified.** — Any personal disqualification of the plaintiff will be ground for refusing relief, whatever be the equities of others, and whether it arises from his laches, or his own acquiescence, or that of the original holder from whom he purchased, if he had notice of it. It is a general principle, founded upon the law of contract, that the directors and the majority of a company may be restrained from employing money subscribed for one purpose in the prosecution of another, however advantageous; but, like other general principles, it is subject to many qualifications in its application. So one entitled to an equitable remedy may so conduct himself as to give rise to a new equity against himself and bar his right to the remedy. One entitled to sue on behalf of the corporation should come with diligence to assert the right. Like many others, it may be lost by delay.¹

§ 749. **Not barred by Acquiescence in other Wrongful Acts.** — The acquiescence of a shareholder in one act of injury to the corporation, or in a series of injuries, constitutes no bar to an action to prevent or recover for other violations of his rights by the same or other parties. Where the acts of the directors are positively illegal, the fact of being cognizant of them, or even of deriving benefit from them, does not prevent a member from afterwards objecting. And if such acquiescence by an original holder does

with the fraudulent intent to issue thereon fictitious stock without additional consideration. An injunction having been granted, a motion was made to dissolve the same on the bill and answer. The latter admitted the doubling of the stock without additional payment, denied that plaintiff was a *bona fide* stockholder, and averred that at first the land was undervalued, and that the increased stock represented the true value. Further, that complainant was estopped from setting up fraud, because his assignor participated in the transaction, and fixed the value of the land after full investigation, but there was no averment that plaintiff had knowledge thereof before purchasing. *Held*, that the motion was properly overruled.

¹ Spelling, *Priv. Corp.* § 638; *Ffooks v. Southwestern Ry. Co.*, 1 Sm. & G. 142, 164; *Burt v. British Assur. Ass'n*, 4 De G. & J. 158, 174; *Taylor v. Holmes*, 8 S. Ct. 1192; *Belmont v. Erie Ry. Co.*, 52 Barb. 663; *Hubbel v. Warren*, 8 Allen, 173; *Cent. R. R. Co. v. Collins*, 40 Ga. 616. "As, on the other hand, a plaintiff, who has a right to complain of an act done to a numerous society of which he is a member, is entitled to effectually sue on behalf of himself and all others similarly interested, though no other may wish to sue; so, although there are a hundred who wish to institute a suit and are entitled to sue, still, if they sue by a plaintiff who has personally precluded himself from suing, that suit cannot proceed." *Burt v. British Assur. Ass'n*, 4 De G. & J. 158.

not bind him, with much less reason could it be held that his acquiescence would bind a subsequent holder of the stock.¹ Indeed, it is doubtful if a shareholder should in any case be bound by acquiescence in a transaction which is clearly illegal. If he has acted as one of a majority, attempting to legalize an *ultra vires* act, he should be at liberty to withdraw his assent on further consideration and prevent its consummation. If an act, or a course of business not authorized by the charter, has been determined upon by the body of shareholders, which the agents of the corporation believe would render its franchise liable to forfeiture by the state, it is clearly their duty to refuse performance. Courts have exercised a liberal discretion in such cases, and have granted preventive relief to shareholders who have formally acquiesced, if by so doing the rights of third parties would not be sacrificed.²

§ 750. **When Relief refused in View of Subsequent Ratification by Corporation.** — Where the act sought to be enjoined is one which, though in excess of the powers of the particular agent against whom relief is sought, is yet capable of ratification by the corporation, a decree for an accounting will be refused.³ But this rule would never apply to acts the doing of which cannot be ratified by less than unanimity. It does not apply to any acts wholly unauthorized by the charter of the corporation, nor to any misappropriation or diversion of funds to objects not contemplated in the agreement of association. All such transactions would be *ultra vires* in the extreme sense of that term, and incapable of ratification against the will of a single member. Indeed, unanimity would not *legalize* such acts.⁴ Nor does the rule apply to cases of threatened wrongs by the agents or other stockholders of the corporation. The mere fact that the injury about to be inflicted to the corporate interests may subsequently be adopted by the majority as its act, will not stand in the way of the court

¹ Spelling, Priv. Corp. § 637; *Bloxam v. Metropolitan Ry. Co.*, L. R. 3 Ch. 337.

² *Ffooks v. Southwestern Ry. Co.*, 1 Sm. & G. 142, 164; *Graham v. Birkenhead, etc. Ry. Co.*, 2 McN. & G. 146; *Leo v. Union Pacific Railway Co.*, 19 Fed. Rep. 283.

³ *Foss v. Harbottle*, 2 Hare, 493, 494.

⁴ *Heath v. Erie Ry. Co.*, 8 Blatchf. 406; *Bagshaw v. Eastern Union Ry. Co.*, 7 Hare, 180; *Salomons v. Laing*, 12 Beav. 377; *Atwool v. Merryweather*, L. R. 5 Eq. 468; *Ives v. Smith*, 3 N. Y. S. 645; *Hoole v. Gt. West. Ry. Co.*, L. R. 3 Ch. 274; *Hazard v. Durant*, 11 R. I. 207; *Brewer v. Boston Theatre Co.*, 104 Mass. 394-397.

furnishing a preventive remedy against the commission of the prejudicial act.¹

§ 751. **Equitable Owner may sue.**—One having the beneficial interest in shares standing in the name of a trustee can maintain an action to protect such interest, but the trustee is a necessary party to the proceeding.² If in such case the consent of the trustee cannot be obtained, he may be made a party defendant, the reason of his non-joinder as plaintiff being alleged. Any party entitled to a transfer of shares on the books of the corporation may sue, if in a position to enforce specific performance of his contract.³ A trustee would undoubtedly have a right to resort to an action to protect the interest of his *cestui que trust* in shares held by the former; but it seems that a mere pledgee of stock cannot maintain a suit against delinquent directors in the name of the corporation. He may sue them, however, in their fiduciary character as such, for any breach of trust affecting his interest.⁴

§ 752. **Summary of Principles governing the Suit of Shareholders.**—It may be stated as a general rule, deducible from what has preceded, that a court of equity will entertain jurisdiction at the suit of a stockholder in a corporation, to restrain the corporation and those who have the control and management thereof from acts tending to a destruction of its franchises, from violations of the charter, from misuse or misappropriation of the corporate powers or property, and from other acts prejudicial to the stockholders amounting to a breach of trust.

And it is equally plain that appropriate relief or redress will be granted in any case, whether it is asked against the management or others, for such acts, where it is shown that the corpora-

¹ Spelling, *Priv. Corp.* § 625; *Ry. Co. v. Allerton*, 18 Wall. 233; *Exeter, etc. Ry. Co. v. Buller*, 5 Eng. Ry. Cas. 211; *Re London, etc. Discount Co.*, L. R. 1 Eq. 277. The owners of a majority of the stock of a corporation, who persuade their "implements and representatives" on the board of directors to convey to them the property of the corporation for a grossly inadequate consideration, in fraud of the minority stockholders, must be held to have participated in the fraud of the directors. *Woodroof v. Howes*, 88 Cal. 184; 26 P. 111.

² *Baldwin v. Canfield*, 26 Minn. 43; 1 N. W. 261; *Gt. West. Ry. Co. v. Rushout*, 5 De G. & S. 290. Compare *Mayer v. Denver, T. & Ft. W. R. Co.*, 38 Fed. Rep. 197.

³ *Bagshaw v. Eastern Un. Ry. Co.*, 7 Hare, 130; *Baldwin v. Canfield*, 26 Minn. 43; 1 N. W. 261. But see *Walker v. Devereaux*, 4 Paige, 229; *Busey v. Hooper*, 35 Md. 15; *Mills v. North. Ry. Co.*, L. R. 5 Ch. 621.

⁴ *Baldwin v. Canfield*, 26 Minn. 43; 1 N. W. 261.

tion is, from any cause, unable or unwilling to proceed on its own behalf, and that the collective interests of the shareholders are involved.

To enumerate all the wrongs, abuses, and shortcomings of corporate officers and agents, which will entitle a shareholder to invoke the exercise of equitable powers by courts, would be unnecessary even if possible. But it may be stated generally that equitable relief will be granted for any infringement of the equitable rights or injuries to the collective beneficial interest of a member, arising from or incident to his connection with the corporation, provided the conditions heretofore enumerated are shown to exist, and provided, further, there is no laches or acquiescence on his part, or some ulterior legal or equitable defence to his right to the remedy asked.¹

§ 753. **Jurisdiction in Actions Involving Foreign Corporations.** — The court has power to enjoin the action of the directors of a foreign corporation when illegal or fraudulent, if they are personally within its jurisdiction.² But a foreign corporation will not be enjoined from delivering its stock and securities to a construction company ;³ nor will the courts entertain jurisdiction to enjoin the business of a foreign corporation where such injunction would practically suspend the corporate franchises.⁴ The authorities are not clear upon the question of entertaining jurisdiction in state courts of actions between foreign corporations. A principal difficulty in such cases is the want of power to enforce the judgments.

§ 754. **Disclosure of Secrets.** — The books and papers of a company are the property of its shareholders, who are entitled to inspect them, though there is a secrecy clause in the articles of association, and though in the course of inspection they will become acquainted with matters which should be kept secret. But it is their duty not to divulge such information so acquired ; and in England a court of equity will restrain them by injunction from

¹ See *San Antonio St. Ry. Co. v. Adams*, (Tex. Civ. App.) 25 S. W. 639 ; *Western Railway of Alabama v. Railroad Co.*, 96 Ala. 272 ; *Raleigh & W. Ry. Co. v. Mining Co.*, 112 N. C. 661 ; *Blymyer v. Iron Works Co.*, 5 Ohio N. P. 71 ; *Meredith v. Iron Co.*, 55 N. J. Eq. 211.

² *Fisk v. Chicago, etc. R. R. Co.*, 53 Barb. (N. Y.) 518 ; *Ives v. Smith*, 3 N. Y. S. 645 ; 19 N. Y. S. Rep. 558. But in *Kansas, etc. R. R. Co. v. Topeka*, 135 Mass. 34, the court refused to entertain jurisdiction of an action by a stockholder of a foreign corporation to restrain it from an *ultra vires* act.

³ *Howell v. Chicago, etc. R. C.*, 51 Barb. 378.

⁴ *Way v. Keyport, etc. Steamboat Co.*, 16 Abb. (N. Y.) Pr. 320, note.

so doing, and will punish them should they offend.¹ It is doubtful if any court in this country would grant an injunction in such a case.

§ 755. **Pertaining to Voluntary Associations.** — The remedy by injunction is frequently invoked successfully to protect property interests and personal rights pertaining to membership in voluntary associations; also to protect the aggregate interest represented by associations generally, whether incorporated or not.² Thus, members of a voluntary association who have incorporated themselves under the name of the association without its consent, may be enjoined from using that name.³ And where some of the officers and members of an independent church forcibly introduce into the church an instrument of music and form of worship contrary to the established principles of the church without the consent of a majority of the members, or of any controlling authority, but against the protest of a majority of the officers appointed to control the affairs, their action is an infringement of the rights of the members, and such a perversion of the church property that equity will restrain it on the application of the members.⁴ On the same principle, where a lot is conveyed to a religious society, for the use of such society, according to the discipline, etc., and the society erects a church building thereon, and the trustees lease the basement thereof, which was made for a prayer-room, to a teacher of a common day school, with leave to him to change the internal arrangements of the room to adapt it to his business, such trustees may be enjoined, on the application of members of the society, from such leasing.⁵ So a bill in chancery is maintainable by the trustees of a church to restrain a clergyman from retaining possession of a church and forcing the congregation to accept his ministrations against their will.⁶ But an injunction will not be granted, at the suit of a pew-holder, to prevent the trustees of a church, where it has become dilapidated,

¹ *Ex parte Buchan*, 36 L. J. (Ch.) 150.

² See *Klein v. Livingston Club*, (Pa. Sup.) 35 A. 606; 177 Pa. St. 224; *Fulbright v. Higginbotham*, (Mo. Sup.) 34 S. W. 875.

³ *Rudolph v. Southern Beneficial League*, 7 N. Y. S. 135; 23 Abb. N. C. 199.

⁴ *Hackney v. Vawter*, 39 Kansas, 615; 18 P. 699.

⁵ *Perry v. McEwen*, 22 Ind. 440.

⁶ *Trustees of First, etc. Church v. Stewart*, 43 Ill. 81. See also *Trustees v. Hoessli*, 13 Wis. 348.

from the purpose of erecting a new one, but will leave the pew-holders to their remedies at law.¹

§ 756. **Same — Expulsion of Members.** — The expulsion of members, though rarely interfered with unless property interests are affected, will be enjoined when attempted in violation of law, or in flagrant disregard of the society's own constitution and by-laws.² But since the admission and expulsion of members are matters peculiarly proper to be controlled or regulated by the corporation itself, only a very plain case of malice, or a total disregard of a member's clear property rights, will warrant a court of equity in interposing to prevent expulsion from the mere personal privileges of membership.³ And where a member of a board of trade has been already expelled by proceedings contrary to the constitution and by-laws, or rules, of the board, a court of chancery cannot restore him by any employment of the writ of injunction. An injunction is a preventive remedy merely, and cannot be so framed as to command a party to undo what he has done.⁴ But while the courts will interfere to secure a fair hearing to one whom it is sought to expel from a club, society, or association,⁵ yet equity will not enjoin the proposed trial of a member of a club for offences against the club merely on his assertion that the tribunal provided for by the constitution is prejudiced against him, where this tribunal has as yet done nothing to deprive him of his right to a fair trial.⁶

¹ *Heeney v. St. Peter's Church*, 2 Edw. (N. Y.) 608.

² *Society of Italian Union, etc. v. Montedonico*, (Ky.) 4 Am. & Eng. Corp. Cas. 22; *Taylor v. Midland R. Co.*, 29 L. J. Ch. 781; *Telegraph Co. v. Davenport*, 97 U. S. 369; *Sloman v. Bank of England*, 14 Sim. 475; *Johnson v. Renton*, L. R. 9 Eq. 181; *Supreme Lodge, Order of the Golden Chain, v. Simering*, (Md.) 40 A. 723. See also *Carmien v. Cornell*, 148 Ind. 83. Where the grand chancellor of the Knights of Pythias of Pennsylvania, an unincorporated society, was suspended by the supreme chancellor of the order, before trial, — *held*, that a court of equity would enjoin his suspension at the suit of other members and officers of the order, who were injured by such suspension, even though the grand chancellor assented to the suspension. *Lowry v. Read*, 3 Brews. (Pa.) 452.

³ *Fisher v. Board of Trade*, 80 Ill. 85; *Thompson v. Tammany Society*, 17 Hun (N. Y.), 305; *Baxter v. Board of Trade*, 88 Ill. 147; *Sturges v. Board of Trade*, 86 Ill. 441; *Gregg v. Massachusetts Medical Society*, 111 Mass. 185; *Rorke v. Russell*, 2 Lans. (N. Y.) 244; *Van Ranst v. New York College*, 4 Hun (N. Y.), 620. Compare *Fisher v. Keane*, L. R. 11 Ch. Div. 353.

⁴ *Fisher v. Board of Trade of Chicago*, 80 Ill. 85.

⁵ *Hutchinson v. Lawrence*, 67 How. (N. Y.) Pr. 38.

⁶ *Gebhard v. New York Club*, 21 Abb. N. C. 248.

§ 757. **Public Considerations in granting and refusing Relief.** — Courts of equity have extensive discretionary powers in these as in other cases where preventive relief is sought. But as to what is a proper case, the court will be guided by the general principles upon which it usually exercises its powers.¹ And a court of equity will not restrain the operations of a private corporation on the sole ground that they are *ultra vires* at the suit of a party whose only grievance is the competition to his business created by such operations.² Though the operations of large companies ought not ordinarily to be arrested by injunction without notice, yet it is a matter resting in the sound discretion of the court; and if a master allows such an injunction without notice, the chancellor will not, of course, dissolve it, though he might have exercised the discretionary power differently.³ But on application for a preliminary injunction to stay the election of officers under an act of incorporation, on the ground that the apportionment of stock by the commissioners was void, it appearing that the injunction would affect the interest of many who had purchased stock in good faith, and it being doubtful whether the commissioners could fix upon another day for the election, if the election was not held at the time appointed, the injunction was denied.⁴

§ 758. **Not granted where Effect would be equivalent to Dissolution of the Corporation.** — Courts of equity have no jurisdiction to dissolve a corporation, either directly or indirectly, except when such power has been conferred upon them by statute, and generally have discretionary power to refuse an injunction when granting it would have that effect, or would for other reason be unjust and inequitable.⁵ While the forfeiture of a charter may

¹ *Kean v. Johnson*, 9 N. J. Eq. (1 Stock.) 401. See also *Delaware, etc. R. R. Co. v. Raritan, etc. R. R. Co.*, 16 N. J. Eq. 821; *Newark Plank Road Co. v. Elmer*, 9 N. J. Eq. (1 Stock.) 754; *People v. New York*, 32 Barb. (N. Y.) 102.

² *Rayburn Water Co. v. Armstrong Water Co.*, 9 Pa. Dist. R. 24.

³ *Perkins v. Collins*, 8 N. J. Eq. (2 Green) 482. See *Capner v. Flemington Mining Co.*, Id. 467.

⁴ *Walker v. Devereaux*, 4 Paige (N. Y.), 229.

⁵ *Ottaquehee Woolen Co. v. Newton*, 57 Vt. 451. "Where there has been an exercise of powers, in excess or beyond the powers given by an act of parliament, I apprehend that no one but the attorney-general, on behalf of the public, has a right to apply to this court to check the exorbitance of the party in the exercise of the powers confided to him by the legislature. If an individual has sustained no damage, and there is no reason to apprehend that he will sustain damage, notwithstanding his being nearer to the possible cause

be adjudged for long-continued misuser or for other sufficient cause, it can only be brought about in a court of law and in a proper proceeding instituted for the purpose.¹

B. MATTERS WARRANTING RELIEF.

§ 759. Breaches of Trust.

760. Sale of Essential Property.

761. Change of Route and Extension of Railroad.

762. Unauthorized Consolidations; Guaranteeing Profits of other Companies.

763. Application to Parliament or Legislature.

§ 764. Expenditures for Litigation where Corporation not interested.

765. Unauthorized Inflations and Reductions of Capital Stock.

766. Wrongful Issue of Preferred Stock.

767. Illegal Assessments.

768. Fraudulent Transfers of Stock.

769. Unwarranted Payment of Dividend.

§ 759. **Breaches of Trust.** — The protection of courts of equity by injunction or other appropriate remedies will be extended to stockholders in all cases where misappropriation of corporate funds, unauthorized issue of shares, or any other act injurious to them as members, and which is a departure from the chartered purposes, is threatened.² Such directors and other corporate agents occupy the relation to members of a corporation of trustees as well as that of agents. A court of equity in a proper case will enjoin them from abuse of power or violation of duty prejudicial to the interests of the members, who are considered in equity as the *cestuis que trust* both of the corporation and of the directors representing it.³ Accordingly, it was held that direct-

of injury than the rest of the public, he has no peculiar position of claim to entitle him to become the redresser of a public grievance or to complain of the disregard of the provisions of an act of parliament." *Ware v. Regents Canal Co.*, 5 Jur. 25.

¹ *King v. Armory & Monk*, 2 Term, 515; *King v. Pasmore*, 3 Term, 199; *King v. Saverton*, Yelv. 190.

² *Central R. Co. v. Collins*, 40 Ga. 582; *Brewer v. Boston Theatre Co.*, 104 Mass. 478; *Dodge v. Woolsey*, 16 How. (U. S.) 831; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159; *Stewart v. Erie, etc. Transp. Co.*, 17 Minn. 372; *Rogers v. Lafayette, etc. Works*, 52 Ind. 297; *Bronson v. Lacrosse, etc. R. Co.*, 2 Wall. (U. S.) 302; *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220; *Faulds v. Yates*, 57 Ill. 416; *Terwilliger v. Great Western, etc. Co.*, 59 Ill. 249; *Tippecanoe Co. v. Lafayette, etc. R. Co.*, 50 Ind. 86; *Platteville v. Galena, etc. R. Co.*, 43 Wis. 493; *Taylor v. Miami Exp. Co.*, 5 Ohio, 162; *Underwood v. New York, etc. R. Co.*, 17 How. (N. Y.) Pr. 537; *Hazard v. Durant*, 11 R. I. 195; *March v. East. R. Co.*, 40 N. H. 567; s. c. 43 N. H. 515; *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 46; *Sears v. Hotchkiss*, 25 Conn. 175; *Pratt v. Pratt*, 33 Conn. 446.

³ *Colman v. Eastern Counties R. Co.*, 10 Beav. 1; *Mozley v. Alston*, 1 Ph.

ors would not be allowed to purchase the debt of a creditor and then sue a single unwilling shareholder in his name, so as to enforce contribution.¹

§ 760. **Sale of Essential Property.** — A dissenting stockholder may prevent the sale, by the directors, or even by the majority of the stockholders, of the corporate property which is essential to the continuance of the business of the corporation, unless such sale is made with a view to a dissolution of the corporation or the payment of the corporate debts.² The rules that the general right of control and power of disposing of the corporate property is vested in the chosen officers and managers, and that the majority rule should be respected, have no application to such a case. The property can only be disposed of in due course of business, to effect the legitimate objects of the corporation, and not for any ulterior purpose, to allow which would be a breach of trust as to the stockholders, and a fraud upon creditors.³ The court will not leave a shareholder at the mercy of the agents in such case, merely because the members may possibly assemble at a subsequent date and sanction the threatened wrong. Besides, it is the right and privilege of each member that the majority shall be consulted in advance, and an agent cannot assume the exercise of powers not conferred upon him in the first instance. The suing shareholder should not be relegated to his primary remedy for *inter se* wrongs, and there should

798; *Kean v. Johnson*, 1 Stock. (N. J.) 401; *Att'y-Gen. v. Great N. R. Co.*, 1 Dr. & Sm. 154; *Bagshaw v. Eastern R. Co.*, 7 Hare, 114; *Sears v. Hotchkiss*, 25 Conn. 171; *Manderson v. Commercial Bank*, 28 Pa. St. 379; *Central R. Co. v. Collins*, 40 Ga. 582; *Frostburg Building Ass'n v. Stark*, 47 Md. 338; *Dummer v. Chippenham*, 14 Ves. 245; *Wisuree v. First Congregational Church*, 14 Ohio St. 81; *Gartside v. East St. Louis*, 43 Ill. 47; *Ware v. Regents, etc. Co.*, 3 De Gex, 212.

¹ *Beck v. Dean*, 3 Jur. n. s. 14.

² *Smith v. N. Y. Consol. Stage Co.*, 18 Abb. Pr. 419, 435; *Robbins v. Clay*, 33 Me. 132; *Sheldon H. B. Co. v. Eickmeyer H. B. Co.*, 56 How. Pr. 78; *Barclay v. Quicksilver Min. Co.*, 9 Abb. Pr. n. s. 284; *Myers v. Scott*, 2 N. Y. S. 753; 50 Hun, 603; *Copeland v. Citizens' Gas-Light Co.*, 61 Barb. 60; *Conroy v. Port Henry I. Co.*, 12 Barb. 27; *Adriance v. Rome*, 52 Barb. 399; *Brady v. Mayor*, 16 How. Pr. 432; *Middlesex R. Co. v. Boston, etc. R. Co.*, 115 Mass. 347; *Dana v. B'k of U. S.*, 5 Watts & S. 247; *Un. B'k v. Ellicott*, 6 Gill & J. (Md.) 363; *Kean v. Johnson*, 9 N. J. Eq. 401.

³ *Boston & P. R. Corp. v. N. Y. & N. E. R. R. Co.*, 13 R. I. 260; *Balliett v. Brown*, 103 Pa. St. 546; *Gray v. N. Y. & V. Steamship Co.*, 5 Thomp. & C. (N. Y.) 224. Compare *Hutchinson v. Green*, 91 Mo. 367; 1 S. W. 853.

be no postponement or delay where prejudice would result to the right of the plaintiff.¹

§ 761. **Change of Route and Extension of Railroad.** — “Nothing is more certainly settled than that any fundamental alteration of a charter, or material deviation from or extension of a road in the case of road companies, interferes with the rights of the corporators, and no majority, however large, can compel any individual stockholder to submit.”² Accordingly, a corporation created for the purpose of constructing a railroad between certain termini will be enjoined, at the instance of a stockholder who has not assented thereto, from using the funds of the corporation or pledging its credit, for the purpose of extending the road beyond the termini; and the rule is not changed by the fact that the extension was authorized by the legislature and approved by a majority of the stockholders.³

§ 762. **Unauthorized Consolidations — Guaranteeing Profits of other Companies.** — It is also well settled that corporations already formed without the existence of such statutory provisions, conferring upon a majority the power to consolidate, or express agreement at the time of their formation, cannot be consolidated without unanimous consent of their members, even though the legislatures should authorize the consolidation to be made; for it would, if allowed, work a fundamental change in the contracts of membership. Without the consent of every member given through the charter or otherwise, an attempt to effect a consolidation by a majority vote is wholly nugatory, and a single dissenting member may, by objecting, prevent the proposed change.⁴

¹ *Tuscaloosa Mfg. Co. v. Cox*, 68 Ala. 71; *Mozley v. Alston*, 1 Phil. 800; *Baker v. Backus's Adm.*, 32 Ill. 101-108; *Gray v. Lewis*, L. R. 8 Ch. 1050; *Russell v. Wakefield W. W. Co.*, L. R. 20 Eq. 474; *McMurray v. Northern Ry. Co.*, 22 Grant (U. C.) Ch. 476; *Samuel v. Holladay*, 1 Woolw. (U. S. C. Ct.) 214; *Hawes v. Oakland*, 104 U. S. 450; *Karnes v. Rochester, etc. R. R. Co.*, 4 Abb. Pr. n. s. 111, 112; *New York & Boston Rapid Transit Co. v. Parrott*, 36 F. 462.

² *Kean v. Johnson*, 1 Stock. (N. J.) 401.

³ *Stevens v. Rutland & Burlington R. R. Co.*, 29 Vt. 545. Compare *Rutland, etc. R. R. Co. v. Thrall*, 35 Vt. 536, holding that if the proposed change of route was abandoned, the original subscriptions may be enforced. See *Hartford, etc. R. R. Co. v. Croswell*, 5 Hill (N. Y.), 383; *McCullough v. Moss*, 1 Den. (N. Y.) 580; *Schenectady, etc. R. R. Co. v. Thatcher*, 11 N. Y. 102; *Buffalo, etc. R. R. Co. v. Dudley*, 14 N. Y. 336.

⁴ *Spelling, Priv. Corp.* § 96; *Lauman v. Lebanon, etc. R. R. Co.*, 30 Pa. St. 46; *Black v. Delaware, etc. Canal Co.*, 24 N. J. Eq. 467; *Knoxville*

On the same principle, where the directors of a railway company, for the purpose of increasing the traffic, proposed to guarantee certain profits, and secure the capital of an intended steam-packet company, which was to act in connection with the railway, it was held that such a transaction was not within their powers, and they were restrained by injunction.¹

§ 763. **Application to Parliament or Legislature.**—It was once settled law in England that courts of equity there had jurisdiction to restrain corporations from obtaining legislative acts by petition to parliament, for a change in their powers;² but such decisions are probably inapplicable to any case which might arise in this country, the jurisdiction here being confined to cases in which there is abuse of corporate power or misapplication of corporate funds. And even in England, by later decisions, the view seems to prevail that a corporation will not be enjoined at the suit of a shareholder from making application to parliament in its corporate capacity, by petition under its corporate seal, for an extension of its powers; and the right of taking such action is regarded as an incident to its other powers.³ And the trustees of a foreign corporation will not be enjoined from applying to the legislature of the state or country creating it, for power to increase the capital stock of the company.⁴ In this country, where the right of petition is protected by constitutional provisions and is considered sacred to every citizen, this branch of equitable juris-

v. Knoxville, etc. R. R. Co., 22 Fed. Rep. 758; *Botts v. Simpsonville Tp. Co.*, 88 Ky. 54; 10 S. W. 134; *Young v. Rondout & K. Gas-Light Co.*, 15 N. Y. S. 443.

¹ *Colman v. Eastern Counties Railway Co.*, 10 Beav. 1. Langdale, master of the rolls, said: "I apprehend that it has nowhere been stated that a railway company, as such, has power to enter into all sorts of other transactions. Indeed, it has been very properly admitted that railway companies have no right to enter into new trades or businesses not pointed out by their acts. They have the power to do all such things as are necessary and proper for the purpose of carrying out the intention of the act of parliament, and they have no power of doing anything beyond it."

² *London, Chatham, & Dover Railway Arrangement Act*, L. R. 5 Ch. App. 671; *Heathcote v. North Staffordshire R. Co.*, 2 Mac. & G. 100; *Lancaster & C. R. Co. v. The North Western R. Co.*, 2 Kay & J. 293.

³ *Ware v. Grand Junction W. Co.*, 2 Russ. & M. 470; *Great Western R. Co. v. Rushout*, 5 De G. & Sm. 290. In case of an application so made an injunction will not be granted upon the ground that in the opinion of the complaining shareholders the measure whose enactment is sought is inexpedient. *London, Chatham, & Dover Railway Arrangement Act*, L. R. 5 Ch. App. 671.

⁴ *Bill v. Sierra Nevada Co.*, 1 De G. F. & J. 177.

diction has not been recognized, and equity will not interfere with or enjoin the exercise of the right of petition to the legislature upon a matter of either public or private concern.¹ But the use of corporate funds for defraying the expenses of such an application and for procuring an extension of the business beyond the legitimate objects for which the company was constituted, will be enjoined at the suit of shareholders.²

§ 764. **Expenditures for Litigation where Corporation not interested.** — A railway company has no power to expend its funds in the prosecution of a suit not instituted by it; and a court of equity will, at the instance of a shareholder, restrain it from doing so, without going into the question whether or not the suit is for the benefit of the company.³ And English directors of a foreign railway company which was subject to Turkish law (as to which there was no evidence before the court), were restrained from applying the funds of the company in the further payment of the costs of a prosecution for libel brought by them against a person who had acted as secretary to a committee of the company.⁴

§ 765. **Unauthorized Inflations and Reductions of Capital Stock.** — Various devices have been resorted to by corporations for inflating or “watering” their capital and raising money on shares, in violation of statutory and constitutional provisions declaring that certificates shall only be issued for their par value in cash or property or labor at its actual cash value. All such transactions are *ultra vires*, and will be restrained on application of a non-consenting shareholder.⁵ An injunction against the directors of a corporation, who are charged with issuing illegal stock in excess of the actual capital, should not however extend beyond the transaction in question, and enjoin dealings in the genuine stock, unless special necessity for such interference is shown.⁶ An in-

¹ Story *v.* Jersey City & B. B. R. R. Co., 1 C. E. Green, 13.

² Stevens *v.* South Devon R. Co., 18 Beav. 48; Att’y-Gen. *v.* Commissioners of Kingstown, T. R. 7 Eq. 383; Hunt *v.* Shrewsbury R. Co., 13 Beav. 1; Simpson *v.* Denison, 10 Hare, 62; Spackman *v.* Lattimore, 3 Gif. 16; Vance *v.* East Lancashire R. Co., 3 Kay & J. 50; Great Western R. Co. *v.* Rushout, 5 De G. & Sm. 290; Telford *v.* Metropolitan Board of Works, L. R. 13 Eq. 574.

³ Kernaghan *v.* Williams, L. R. 6 Eq. 228.

⁴ Pickering *v.* Stephenson, L. R. 14 Eq. 322.

⁵ Spelling, Priv. Corp. § 599.

⁶ Fisk *v.* Chicago, etc. R. R. Co., 53 Barb. (N. Y.) 513; 4 Abb. Pr. n. s. 378; 36 How. Pr. 20.

junction will, on like principles and with a view to preventing an *ultra vires* act, issue to prevent an illegal reduction of capital stock; but an injunction at the suit of a stockholder, forbidding a corporation to reduce its capital stock in a mode authorized by law, cannot be sustained, on a mere apprehension that the corporation may become unable to pay its debts, and that the plaintiff's individual liability for such debts will be increased by the reduction.¹

§ 766. **Wrongful Issue of Preferred Stock.** — No right in the corporation to issue preferred stock existed at common law. It must be sought for in the charter or statute under which the corporation is formed. The holders of common stock cannot object to an amendment to the charter authorizing an issue of preferred stock, where it is also provided that their consent to the provision enacted should first be obtained, and that they should be given the privilege of taking all the preferred stock.² But the abuse of the power when given, or its attempted exercise when not given, will be enjoined at the suit of a dissenting holder of common stock who has brought his suit for the purpose within a reasonable time.³ He need not delay action until there are funds to make a dividend.⁴

§ 767. **Illegal Assessments.** — Where an action at law would fail to afford adequate redress for wrongs done under an illegal assessment upon shares of stock made by corporate officers, an injunction is the appropriate remedy. The remedy by injunction

¹ *Joslyn v. Pacific Mail Steamship Co.*, 12 Abb. (N. Y.) Pr. n. s. 329.

² *Spelling, Priv. Corp.* § 602; *City of Covington v. Bridge Co.*, 10 Bush, 69; *Re The South Durham Brewery Co.*, 53 L. T. Rep. n. s. 928. But the issue of preferred stock cannot be created by a by-law enacted after incorporation. *Hutton v. Scarborough, etc. Co.*, 2 Dr. & Sm. 521; *Ashbury v. Wilson*, T. R. 30 Ch. D. 376. Such issue would be valid under a by-law, however, if authorized by the charter. *In re South, etc. Co.*, L. R. 31 Ch. D. 261. And under a power to increase capital stock "in such manner and with and subject to such rules and regulations and privileges and conditions" as the company may see fit, it has been held that preferred stock may be issued. *Harrison v. Mex. R. R. Co.*, L. R. 19 Eq. Cas. 358. Amendments made to by-laws of corporations, but afterwards repealed, and agreements afterwards cancelled, will not be considered as never having existed, but will be regarded as admissions or expressions of policy in the settlement of disputes between preferred and common stockholders as to their respective rights to dividends. *Belfast & M. L. R. Co. v. City of Belfast*, 77 Me. 445; 1 A. 362.

³ *Guinn v. Land Corp., etc.*, L. R. 22 Ch. D. 349.

⁴ *Sturges v. Eastern, etc. Ry. Co.*, 7 De G. M. & G. 158.

prevents multiplicity of suits, and determines the rights of all parties on whose shares the assessment is sought to be enforced, and therefore undoubtedly is the most convenient as well as the most efficacious remedy.¹ But where a statute prohibits the bringing of an action to recover stocks sold, based on non-compliance with statutory formalities, unless a tender is first made of assessments and interests, an injunction will not be granted to restrain an irregular sale without such tender being first made.²

§ 768. **Fraudulent Transfers of Stock.** — Certificates of stock have, to a certain extent, a negotiable character; and a *bona fide* purchaser of such certificate would have a right to hold the corporation bound by the statements therein, as in the case of commercial paper, without being affected by its false and fraudulent character as between the original parties. This being the case, and the corporation being threatened with irreparable injury, would have the right to an injunction restraining its transfer, and also to have it delivered up for cancellation. A shareholder under these circumstances should sue for the protection of his equitable rights, as in other cases, if the corporation were unable to protect him.³ So, when stock in a corporation is transferred, without consideration, for the purpose of fraudulently controlling an election, injunction is the proper remedy to prevent transferees from voting.⁴

§ 769. **Unwarranted Payment of Dividend.** — If a dividend is declared by directors of a corporation where there has in fact been no money earned with which to pay it, its payment will be enjoined upon the application of a stockholder, where the power to declare dividends otherwise than from the profits has not been given by statute.⁵ So a corporation may be restrained from pay-

¹ Burnham v. S. F. F. Mfg. Co., 76 Cal. 28; 17 P. 939.

² Ibid.

³ Spelling, Priv. Corp. § 580.

⁴ Webb v. Ridgely, 38 Md. 364.

⁵ Painesville, etc. R. R. Co. v. King, 17 Ohio St. 534; Carpenter v. N. Y. & N. H. R. R. Co., 5 Abb. Pr. (N. Y.) 277; Burnes v. Pennell, 2 H. L. Cas. 497; Pronik v. Spirits Distributing Co., 42 A. 586. See Drew v. Incorporated Town of Geneva, 150 Ind. 662; Frederick County Nat. Bank v. Shafer, 87 Md. 54; Warlier v. Williams, 53 Neb. 143; Scott v. Smith, 121 N. C. 94; Winans v. Beidler, 6 Okl. 603; Buel v. Baltimore & O. S. W. Ry. Co., 53 N. Y. S. 749. A payment of interest to the shareholders before any profits have been realized, out of capital or borrowed moneys, even though made in pursuance of a resolution at a meeting, is *ultra vires*, and will be restrained by injunction, as being, in effect, a lessening of the capital to the

ing dividends already declared, where it has no surplus earnings, or where, although it had a sufficient surplus when the dividend was declared, yet before it became due the surplus was swept away by the fraud of one of its officers or other unforeseen circumstances.¹ And the payment of dividends out of the capital stock will be restrained.² So a corporation will be restrained from paying dividends out of money necessary to make repairs.³ But to entitle a stockholder to maintain the action, he must show that he is entitled to share in the dividend.⁴ Nor will a court of equity restrain the payment of a dividend merely upon the ground that the directors have acted in violation of their duties to the public.⁵ And another company cannot maintain a bill to restrain the payment of a dividend to stockholders, such other company basing its action on a right of distress for the non-payment of toll charges.⁶

II. PERTAINING TO INTERESTS OF THIRD PARTIES IN MANAGEMENT CORPORATE AFFAIRS.

§ 770. General View.

771. When Creditor entitled to an Injunction.

772. Injunction upon Insolvency of Corporation.

§ 773. Injunction and Receiver not a Remedy for Abuse and Usurpation of Franchises.

774. Injunctions by Stockholders on Behalf of Corporation against Third Parties.

§ 770. **General View.** — As a general rule, to entitle a party to relief by injunction against the illegal or fraudulent proceedings of corporate officers, the party seeking relief must be a stockholder of the corporation.⁷ But this rule only applies to the in-

prejudice of the creditors. *MacDougall v. Jersey Imperial Hotel Company*, 2 H. & M. 528.

¹ *Carpenter v. N. Y. & N. H. R. R. Co.*, 5 Abb. Pr. (N. Y.) 277; *Carlisle v. Southeastern Railway Co.*, 13 Beav. 295; *Fawcett v. Laurie*, 1 Dr. & Sm. 192. Where specific funds had been set apart for payment of dividends, an injunction does not lie. *LeRoy v. Globe Ins. Co.*, 2 Edw. Ch. (N. Y.) 657.

² *Bloxham v. Metropolitan Railway Co.*, L. R. 3 Ch. 387.

³ *Dent v. London Tramway Co.*, 1 Am. & Eng. R. R. Cas. 592.

⁴ *Carlisle v. Southeastern Railway Co.*, 14 Jur. 535.

⁵ *Brown v. Monmouthshire Railway & Canal Co.*, 13 Beav. 32; *Stevens v. South Devon Railway Co.*, 9 Hare, 313.

⁶ *South Yorkshire Railway Co. v. Great Northern Railway Co.*, 9 Exch. 55.

⁷ *Roebing v. First National Bank*, 80 F. 744; *Spelling, Priv. Corp.* §§ 541-

ternal management proper. Where in transacting the corporate business a party dealing with the corporation becomes entitled to an injunction on general principles, he will not be denied relief merely because the internal management will be thereby interrupted. And an injunction may be issued to restrain a railroad company from wasting its means in constructing branch roads to an extent which may disable it from completing its main line, or from building, under the name of a branch, a road which will enable it to evade constructing the road according to the survey and location on the faith of which a town expecting to be benefited by it has subscribed to its stock and loaned bonds to it.¹ On the other hand, the court will not restrain a company from doing an act within the scope of its objects, on the ground that if the company does that act the doing of it may incapacitate the company from performing something else which is also within the scope of its objects.² Both common and extraordinary legal and equitable remedies are administered in favor of and against private corporations in like manner and upon the same terms as between individuals.³

§ 771. **When Creditor entitled to an Injunction.** — The right of a creditor of a corporation to an injunction to restrain wrongful acts of its agents or others rests upon a different basis from that of shareholders. As between shareholders, no action lies at law except in certain special cases provided by statute. But creditors are always entitled to a judgment, and the ordinary judicial means for enforcing it, upon the maturity of their claims. But they are not entitled to an injunction against a corporation or its agents

545. See also *Fitzgerald v. Mo. Pac. R. Co.*, 45 F. 823; *Whitehouse v. Sprague*, (Me.) 7 A. 17; *Harkness v. Manhattan R. Co.*, 54 N. Y. Supr. Ct. 174; *Baldwin v. Canfield*, 26 Minn. 43; 1 N. W. 261; *Bundy v. Iron Co.*, 38 O. St. 300; *Frank v. Dunkhair*, 76 Mo. 508; *Button v. Hoffman*, 61 Wis. 20; 20 N. 667; *Durant v. Kennett*, L. R. 5 C. P. 262; *Murphy v. Hanrahan*, 50 Wis. 485; 7 N. 436.

¹ *Platteville v. Galena, etc. R. R. Co.*, 43 Wis. 493.

² *Syers v. Brighton Brewery Company (Limited)*, 11 L. T. n. s. 560. Plaintiff, a foreign corporation, organized for the purpose of collecting news and furnishing the same to the newspapers, cannot maintain an action to restrain an unincorporated association engaged in the same business from enforcing a rule that its members should take no news from other news agencies; the association not being governed by any corporate duty, and owing no duty to plaintiff, which was attempting to compete with it. *Dunlap's Cable News Co. v. Stone*, 15 N. Y. S. 2.

³ *Spelling, Priv. Corp.* § 707.

except upon general principles and in a clear case. To entitle them to any extraordinary remedy, it must appear that the ordinary remedies at law are inadequate, and that without the specific relief asked for, they would suffer irreparable loss. When these facts are made to appear, a court of equity will administer whatever remedies the exigencies of the case demand, and will enjoin the act complained of, or appoint a receiver to wind up the company's affairs; in short, make such orders as justice to all the parties warrant.¹ It has been held that the devotion of funds and subjection of corporate control to a competing railroad company by the directors being *ultra vires* and contrary to public policy, as tending to create a monopoly, and rendering the charter liable to forfeiture, creditors are entitled to an injunction to restrain the unlawful proceeding, and to an accounting for any loss to themselves occasioned by such acts already consummated.² But upon the weight of authority the right of creditors to interfere in such case is doubtful, to say the least.³ The rights of creditors to the assets of a corporation being superior to the rights of a stockholder to a dividend, if a dividend is declared at a time when the

¹ Spelling, Priv. Corp. § 720. In *Fisk v. Un. Pac. Ry. Co.*, 10 Blatchf. 518, an injunction was granted at the suit of a creditor to restrain it from taking any proceedings for its own dissolution, or for the appointment of a receiver of its effects, or making further distribution thereof among its stockholders or any other persons. See also *Irons v. Mfrs. Nat. B'k*, 6 Biss. 301; *Conro v. Gray*, 4 How. Pr. 166; *Innes v. Lansing*, 7 Paige Ch. 583; see also *Whitcomb v. Fowle*, 7 Abb. N. C. 295.

² *Langdon v. Branch*, U. S. C. C. E. Dist. Ga., 1888, 87 Fed. Rep. 449, holding that equity will enjoin the carrying out of such agreements, and will seize the assets of an insolvent construction company at the instance of persons who have loaned money to its president and sole managers to build the road on the faith of his pledge of a share of the profits derived from the work; the company occupying as to them the relation of a derelict trustee. Compare *Levy v. Mutual Life Ins. Co.*, 7 N. Y. S. 562. A motion to restrain and enjoin will be refused, by a court of chancery in New Jersey, where, upon pleadings and proof, the court would not be warranted in declaring a corporation insolvent, and subjecting it to the provisions of the act, to prevent frauds by incorporated companies. *Rawnsley v. Trenton Mutual Fire Ins. Co.*, 9 N. J. Eq. (1 Stock.) 95.

³ Where one creditor cannot be injured by the dissolution of an injunction granted on the filing of a bill by creditors against a corporation, and its continuance would defeat the plans for the reorganization of the corporation entered into by the creditors, and would be inconsistent with previous orders in the case, there is no equity that would justify the court in maintaining the injunction at the sole instance of one creditor as against all the other creditors, as well as the corporation. *Washington City & Point Lookout R. R. Co. v. Southern Maryland R. R. Co.*, 55 Md. 153.

corporation is in fact insolvent, creditors may enjoin its payment and compel an application of the money to the payment of their claims. When, however, at the time when a dividend is declared the corporation is solvent, and a specific fund has been appropriated to pay such dividend, the fact that it soon afterwards became insolvent will not defeat the right of the stockholders to the dividend, and injunction will not lie to prevent its payment.¹

§ 772. **Injunction upon Insolvency of Corporation.** — The practice of granting an injunction upon insolvency to restrain the insolvent and his agents from further dealing in the assets is not peculiar to corporations, and has been incidentally discussed under other heads.² Besides, the jurisdiction and practice in insolvency matters are to a great extent regulated by statutes.³

§ 773. **Injunction and Receiver not a Remedy for Abuse and Usurpation of Franchises.** — An action is not maintainable by a stockholder against a corporation and its trustees to prevent, by an injunction and receiver, the usurpation of corporate powers, but the action should be by the attorney-general in the name of the state; and the appointment of a receiver in a stockholder's action should not be allowed to prevent proceedings in an action by the attorney-general.⁴ The same principle applies to others than stockholders; and one not a stockholder in a corporation, and whose rights are not infringed by its acts, cannot have an injunction to restrain those acts on the ground that they are *ultra*

¹ *Lamar v. American Fire Ins. Co.*, 6 Paige Ch. (N. Y.) 482.

² *Supra*, §§ 527, 528.

³ *City of New York v. Starin*, 2 N. Y. S. 346. In this case it was held that where an injunction restraining the ordinary business of a corporation also restrains another from transacting the business, who in fact controlled the corporation, its incorporators being men in his employ, and whose injunction would suspend the business of the corporation, the injunction, if granted without notice, is, under section 1809, void as to such person as well as to the corporation.

⁴ *People v. Erie Railway Co.*, 36 How. (N. Y.) Pr. 129; *Hovelman v. Kansas City Horse R. R. Co.*, 79 Mo. 632; *Attorney-General v. Chicago, etc. R. R. Co.*, 35 Wis. 425. See also *Erin Tp. v. Detroit & E. Plank-Road Co.*, 73 N. W. 556; *Philadelphia, W. & B. R. Co. v. Wilmington City Ry. Co.*, 38 A. 1067; *Armington v. Palmer*, 42 A. 308; 43 L. R. A. 95; *Sims v. Same*, Id. See *Grobe v. Roup*, 44 W. Va. 197. On an application by the attorney-general in New York for an injunction against a banking corporation to restrain a violation of law, it is not necessary to show specifically that the commission of the act would produce injury to the plaintiff under section 219 of the Code. *People v. Metropolitan Bank*, 7 How. (N. Y.) Pr. 144.

vires.¹ On the other hand, the fact that proceedings in the nature of a *quo warranto* are pending to test the validity of the creation of a corporation, should not be allowed to affect the decision of an application to grant or dissolve a temporary injunction in a suit to restrain the company from acquiring lands and proceeding to construct its works.²

§ 774. **Injunctions by Stockholders on Behalf of Corporations against Third Parties.** — A single stockholder in a corporation has undoubtedly the same right to institute legal proceedings against the corporation for the protection of his individual rights that a third party not a stockholder possesses; but when he resorts to such proceedings to protect, not simply such interests, but the property and rights of the corporation against the action or threatened action of third parties, thus assuming duties properly devolving upon its directors, he must show a clear breach of duty on their part in neglecting or refusing to act in the matter, amounting to such grossly culpable conduct as would lead to irremediable loss to him if he were not permitted to bring the matter before the courts.³ But a shareholder may maintain a bill

¹ *New Orleans, Mobile, & Texas Railroad Co. v. Ellerman*, 105 U. S. 166; *Attorney-General v. Railroad Co.*, 35 Wis. 425; *United States v. Union Pacific R. R. Co.*, 98 U. S. 569; *Attorney-General v. Tudor Ice Co.*, 104 Mass. 237; 6 Am. Rep. 227. Justice Gray, in *Attorney-General v. Tudor Ice Co.*, *supra*, discusses this subject with great ability, and sheds much light upon the legal principles governing the jurisdiction, citing and commenting at length upon numerous authorities. By way of introduction to his comments on previous adjudications, he said: "This court, sitting in equity, does not administer punishment or enforce forfeitures for transgressions of law; but its jurisdiction is limited to the protection of civil rights, and to cases in which full and adequate relief cannot be had on the common-law side of this court, or of the other courts of the Commonwealth. The Tudor Ice Company is a private trading corporation. It is not in any sense a trustee for public purposes. This is not a suit by a stockholder or a creditor. The acts complained of are not shown to have injured or endangered any rights of the public or of any individual or other corporation, and cannot, upon any legal construction, be held to constitute a nuisance. It is expressly stated, in the report of the chief justice, that 'it does not appear that any of the creditors of the company are in danger of losing by it, and there is no objection to its proceedings, except that they are not authorized by its acts of incorporation, and are alleged to be against public policy for that reason.' No case, is, therefore, made upon which, according to the principles of equity jurisprudence and the practice of this court, an injunction should be issued upon an information in chancery."

² *Aurora, etc. R. R. Co. v. Lawrenceburgh*, 55 Ind. 80.

³ *Detroit v. Dean*, 106 U. S. 537; 1 Am. & Eng. Corp. Cas. 327. In an

to enjoin the collection of a tax on the corporate property, assessed in violation of the charter of the corporation, if the directors, while admitting the illegality of the tax, refuse to take measures to that end, because, as they say, of "obstacles in the way of testing the law."¹ And such neglect and refusal must not be simulated, but real and persisted in, after earnest efforts to overcome it.²

action by a stockholder against a railroad corporation and its directors the bill alleged a violation of agreements between the corporation and others, the use of its credit for unauthorized purposes, the wasting and diversion of its assets from their proper purpose, and the aiding in the construction of a competitive line. *Held*, that a preliminary injunction will not be granted where the conflict of facts in the bill, answer, and affidavits raises a doubtful question as to whether the defendant corporation had assumed or ratified an agreement between its predecessor and a third party in relation to the construction of its lines and equipment, and where the defendant corporation had sued in a state court such third party, and questions arising under the agreement might properly be determined there. *Weidenfeld v. Allegheny & K. R. Co.*, (Cir. Ct.) 47 F. 11.

¹ *Dodge v. Woolsey*, 18 How. 331.

² *Hawes v. Oakland*, 104 U. S. 450; *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Foss v. Harbottle*, 2 Hare, 461; *Tuscaloosa Mfg. Co. v. Cox*, 68 Ala. 71; *Mozley v. Alston*, 1 Ph. 790; *Gray v. Lewis*, L. R. 8 Ch. App. 1035; *McDougall v. Gardiner*, 1 Ch. Div. 13; *March v. Eastern R. Co.*, 40 N. H. 548; *Brewer v. Boston Theatre*, 104 Mass. 378; *Hersey v. Veazie*, 24 Me. 9; *Allen v. Curtus*, 26 Conn. 456; *French v. Gifford*, 30 Iowa, 148; *Pratt v. Jewett*, 9 Gray (Mass.), 34; *Greaves v. Gouge*, 69 N. Y. 154. See also *Merchants' & Planters' Line v. Waganer*, 71 Ala. 581; *Dimpfell v. Ohio, etc. R. Co.*, 110 U. S. 209.

CHAPTER XVIII.

PROTECTION OF EXCLUSIVE STATUTORY RIGHTS.

I. FRANCHISES.

II. PATENTS.

III. COPYRIGHTS.

A. Basis of Equitable Jurisdiction — Nature
of Right — How violated.

B. Principles applied.

I. FRANCHISES.

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| <p>§ 775. Basis of the Jurisdiction.</p> <p>776. Power of State to confer Exclusive Privileges.</p> <p>777. Exclusive Right not protected in another State.</p> <p>778. Conflict with Powers of Congress.</p> <p>779. Contractual Relations created by Grant of Exclusive Privilege.</p> <p>780. Consideration to support Grant.</p> <p>781. Further as to Character of the Right to be protected.</p> <p>782. The Allegations.</p> <p>783. Exclusive Rights conferred by Private Contract.</p> <p>784. Exclusiveness of Right must be shown.</p> <p>785. When Future Legislation not forestalled.</p> <p>786. Same Subject — Disputed Right.</p> <p>787. Same — No Prior Judgment at Law required.</p> <p>788. Complainant's Possession — Performance of Conditions.</p> | <p>§ 789. Positive Injury from Wrongful Acts must be shown.</p> <p>790. Considerations of Public Convenience and Inconvenience.</p> <p>791. Nature of Interference immaterial.</p> <p>792. Same — Wrongs which Equity will restrain.</p> <p>793. Diligence of Complainant in seeking Protection.</p> <p>794. Relief barred by Neglect of Public Duties.</p> <p>795. Same — Failure to perform Conditions.</p> <p>796. Abuses of Franchises redressed by State.</p> <p>797. Remedy at Law — Generally.</p> <p>798. Interference by State.</p> <p>799. Action by and against Municipal Corporation.</p> <p>800. Essential Property protected.</p> <p>801. Protection of Ferry Franchises.</p> <p>802. Same — Railroad Franchise.</p> <p>803. Same — Bridge Franchise.</p> |
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§ 775. **Basis of the Jurisdiction.** — Protection of franchises in equity is afforded where there is no adequate legal remedy for the wrong threatened or being inflicted. The inadequacy of legal remedies may either consist in the fact that the injury complained of is not susceptible of computation, or be owing to the fact that without preventive relief it would be necessary to resort to numer-

ous actions at law.¹ Relief against the infringement of a franchise is governed by the same principles as apply to cases of nuisance. Indeed, the disturbance of a franchise usually constitutes, in legal contemplation, a nuisance.² The granting an injunction to protect individuals as well as corporations in the beneficial use and enjoyment of franchises is a very old head of the jurisdiction;³ and it is a fundamental principle that equity will protect an exclusive legal right against violations of hourly repetition and interminable duration.⁴ It may be stated generally that where it is made to appear that an action at law will fail to afford complainant the relief which the necessities of the case require, no matter in what the defectiveness of the legal remedy may consist, the preventive relief against the threatened or existing infringement will be granted; and an injunction was granted to protect an exclusive ferry franchise upon an allegation in the complaint that it was impossible to obtain proof of acts constituting the infringement.⁵ Nor will the court inquire into the motives or the policy of the legislature in granting the franchise. It is sufficient to show that a franchise of an exclusive character has been in fact granted; and an injunction lies to protect a franchise to carry out a lottery scheme for a public purpose. In such case, the suit may be brought by commissioners appointed by law to carry out the purposes of the lottery, to restrain a violation of the franchise committed to them, the state not being a necessary party.⁶

¹ *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35; *Hartford B. Co. v. East Hartford*, 16 Conn. 149; *Livingston v. Van Ingen*, 9 Johns. 507; *Enfield T. H. Co. v. Hartford & N. H. Co.*, 17 Conn. 40; *Lucas v. McBlair*, 12 Gill & J. 1; *In re Vanderbilt*, 4 Johns. Ch. 37; *McRoberts v. Washburne*, 10 Minn. 23; *Boston & L. R. Co. v. Salem & L. R. Co.*, 2 Gray, 1; *Ogden v. Gibbons*, 4 Johns. Ch. 150, affirmed 17 Johns. 488; *North River S. B. Co. v. Hoffman*, 5 Johns. Ch. 300.

² *Boston & L. R. Co. v. Salem & L. R. Co.*, 2 Gray, 1; *Boston Water P. Co. v. Boston & W. R. Co.*, 16 Pick. 512. The same principle is recognized in *Central B. Co. v. Lowell*, 4 Gray, 474, although the injunction was refused on other grounds.

³ *Com. Dig. Chancery, D*, 12; *Newburg Turnpike Company v. Miller*, 5 Johns. Ch. 101, 111; *Ogden v. Gibbons*, 4 Johns. Ch. 159, 160.

⁴ *Long v. Beard*, Term R. (N. C.) 256; *McRoberts v. Washburne*, 10 Minn. 23. But an injunction to restrain persons from carrying on the business of banking, in contravention of a statute of New York, on an information by the attorney-general, was refused by the court. *Attorney-General v. Utica Ins. Co.*, Johns. (N. Y.) 2 Ch. 371.

⁵ *Long v. Merrill*, Term R. (N. C.) 256; s. c. 2 Murph. 339; *Gates v. McDaniel*, 2 Stew. 211.

⁶ *Lucas v. McBlair*, 12 Gill & J. 1.

§ 776. **Power of State to confer Exclusive Privileges.** — Exclusive privileges are not favored in law; and statutes conferring them are strictly construed in favor of the state and against grantees.¹ Nor will equity lend its aid for the protection of a franchise granted by a charter which is not exclusive in its terms; because the government will not be considered as intending to confer an exclusive right in the absence of express language susceptible of no other construction.² A mere grant of a franchise to one for a single purpose, for instance, to construct and maintain a bridge, does not preclude the state from conferring a similar franchise upon others. Thus, where the act conferring upon complainants the right to maintain a toll bridge and receive tolls was not exclusive in its terms, the court of equity refused to enjoin the opening of another bridge so near the first as to greatly impair the profits of the first.³ But when an unmistakable intention to confer an exclusive privilege is expressed in a statute which is not contrary to any constitutional provision, equity has jurisdiction to protect the grantee of such exclusive franchise or monopoly from interference or infringement in the enjoyment thereof by injunction. Thus, where a railroad company is vested with an exclusive franchise to operate a road between certain points, another corporation will be restrained from constructing another road which shall interfere with the enjoyment of such exclusive right.⁴

¹ *Spelling, Priv. Corp.* § 1039; *Norwich Gas-Light Co. v. Norwich City Gas Co.*, 25 Conn. 19; *New York, etc. R. Co. v. Forty-second Street R. Co.*, 50 Barb. (N. Y.) 285; *Savannah R. Co. v. Coast Line R. Co.*, 49 Ga. 202; *United N. J. R. Co. v. Standard Oil Co.*, 33 N. J. Eq. 123; *St. Louis R. Co. v. Northwestern St. L. R. Co.*, 69 Mo. 65; *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755; *Cory v. Yarmouth & N. R. Co.*, 3 Hare, 593; *Butt v. Colbert*, 24 Tex. 355; *President v. Trenton Bridge Co.*, 2 Beas. (N. J.) 46; *Fall v. Sutter Co.*, 21 Cal. 237.

² *Fall v. County of Sutter*, 21 Cal. 237; *President v. Trenton C. B. Co.*, 2 Beas. 46.

³ *Fall v. County of Sutter*, 21 Cal. 237.

⁴ *Boston, etc. R. Co. v. Salem, etc. R. Co.*, 2 Gray (Mass.), 1; *Camden Horse R. Co. v. Citizens' Coach Co.*, 31 N. J. Eq. 525; *Boston Water P. Co. v. Boston R. Co.*, 16 Pick. (Mass.) 512; *Justices v. Griffin & W. P. P. R. Co.*, 11 Ga. 246; *People v. Third Avenue R. Co.*, 45 Barb. (N. Y.) 63; *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475; *Pennsylvania R. Co. v. National R. Co.*, 8 C. E. Green, (N. J.) 441. See *Hartford Bridge Co. v. East Hartford*, 16 Conn. 149; *Enfield, etc. Co. v. Hartfield, etc. R. Co.*, 17 Conn. 40; *Micou v. Tallahassee Bridge Co.*, 47 Ala. 652; *Piscataqua Bridge v. N. H. Bridge*, 7 N. H. 335; *Thompson v. N. Y., etc. R. Co.*, 3 Sandf. (N. Y.) Ch.

§ 777. **Exclusive Right not protected in another State.** — An exclusive franchise to construct and operate a ferry across a river forming the boundary between two states cannot be conferred by one of them acting without the concurrence of the other. And when complainant's only authority was a franchise granted by one of two states bordering upon a navigable river, and he could show none from the state bordered by the opposite shore, an injunction to restrain the operation of a rival ferry was refused.¹

§ 778. **Conflict with Powers of Congress.** — Whether a state could grant an exclusive right of navigation in the interior rivers within its boundaries, was once an important and controverted question. At an early period the right of injunction for the protection of such grant from the legislature of a state was sustained, and it was held that where such exclusive franchise was granted by the state legislature, the grant in no manner conflicted with the power of Congress under the constitution to regulate interstate commerce, that it was valid and not assailable on constitutional grounds.² These doctrines were carried even further, and it was held that such exclusive right of navigation was entitled to protection by injunction, even in cases where it interfered with the right of navigation between different states, and that citizens of another state might be enjoined from interfering with the exercise of the right, and that the case was not altered by the fact that their vessels were duly licensed under the laws of the United States as coasting vessels.³ But these decisions were soon afterwards overthrown in the United States supreme court, and it was there established that the acts of the state legislature granting the exclusive right in question were an interference with the powers of Congress under the constitution to regulate commerce;⁴ and the doctrine of the federal court was subsequently accepted and acted upon by the New York court where the question first arose.⁵ But it was also held, a coasting license, under the laws of

625; *McRoberts v. Washburne*, 10 Minn. 23; *Niagara Bridge Co. v. Great Western R. Co.*, 39 Barb. (N. Y.) 212.

¹ *Challiss v. Davis*, 56 Mo. 25.

² *Moor v. Veazie*, 31 Me. 360.

³ *Livingston v. Ogden*, 4 Johns. Ch. 48; *In re Vanderbilt*, 4 Johns. Ch. 57; *Ogden v. Gibbons*, 17 Johns. 488, reversed, 9 Wheat. 1; *North River S. B. Co. v. Hoffman*, 5 Johns. Ch. 300.

⁴ *Gibbons v. Ogden*, 9 Wheat. 1.

⁵ *North River Steamboat Co. v. Livingston*, 3 Cow. 713.

the United States, does not authorize the exercise by a steamer so licensed of an exclusive privilege.¹

§ 779. **Contractual Relation created by Grant of Exclusive Privilege.** — Grants of exclusive monopolies and privileges may properly be classed under the head of exemptions, since they are in effect agreements not to exercise the power of legislation in the future in a particular manner or for a certain purpose. Legal protection in the enjoyment of special privileges is at war with the very idea of equality which lies at the foundation of a free government.² In the absence of constitutional prohibitions, however, the legislature of a state may bind it by contracts exempting corporations or individuals from competition resulting from future grants of corporate franchises, either perpetually or for a limited period; and by doing so it may forestall subsequent legislation, tending to impair the exclusive right.³ An intention to grant an

¹ *North River Steamboat Co. v. Hoffman*, 5 Johns. (N. Y.) Ch. 300.

² The constitution of Texas prohibits the granting of exclusive monopolies. See *City of Brenham v. Brenham W. Co.*, (Tex.) 4 S. W. 143. So do the constitutions of several other states. See *Des Moines St. R. Co. v. D. M., etc. St. R. Co.*, (Iowa) 33 N. W. 610.

³ *Cit. W. Co. of B. v. B. H. Co.*, 55 Conn. 1; 10 A. 170; *Coast Line R. Co. v. Savannah*, 30 F. 646; *St. T. W. W. Co. v. N. O. W. W. Co.*, 120 U. S. 64. Under an ordinance which grants the exclusive right to operate street railways in a city to a certain corporation for a term of years, such corporation has the right to prevent the operation of a competing line, not only on the streets already occupied by its own lines, but on any street. *Adams, C. J., dissenting; Omaha, etc. R. Co. v. Cable, etc. Co.*, 30 F. 324. The L. Gas-Light Company was organized by special charter granted March 2, 1857, which authorized it to lay its pipes and vend gas in a certain portion of the city of St. L., and exempted it from Rev. St. Mo. 1855, c. 34, art. 1, § 7, providing that the charter of every corporation thereafter created should be subject to alteration by the legislature. In 1868, the charter was amended so as to extend the rights, privileges, and franchises of the company throughout the entire corporate limits of the city. *Held*, that the right to make and vend gas carried with it the right to fix the price, and that it was not subject to regulation by state or city. *Barclay, J., dissenting. State v. Laclede Gas-Light Co.*, (Mo.) 14 S. W. 974. When an electric street railway company, organized under How. St. Mich., c. 95, has obtained and accepted in writing, as required by section 13 of the act, the consent of the common council, given by ordinance, to operate its road in certain streets, the ordinance providing that the poles shall be approved by the council before they are erected, the council cannot, after approving iron poles for the territory within the fire limits, and wooden ones for that without, compel the company to provide transfer tickets, without additional costs, in consideration of being allowed to erect the wooden poles; for such a condition is in conflict with section 14 of the above act, providing that a city shall not revoke its consent once given,

exclusive right or privilege must clearly appear, and will never be implied except from language which leaves no escape from the conclusion that such was the intention of the legislature.¹

§ 780. **Consideration required to support the Grant.** — An exemption from future legislation impairing the enjoyment of a monopoly, like an exemption from taxation, must be based upon a consideration of benefit of a public nature. And when the consideration has been given or performed and accepted by the state the grant becomes irrevocable. There are cases in which it is held that grants of this character, if based either on a benefit already received or merely a public duty assumed by the grantee, are binding upon the state notwithstanding provisions in the constitutions of the states to the effect that "no man or set of men are entitled to exclusive separate emoluments or privileges from the community, but in consideration of public services." In these cases it is held that the requirement that there shall be a "public service" is satisfied and takes the case out of the operation of the constitutional provision by an assumption of the duty and obligation of supplying facilities or commodities to the community. If this view be correct and the reasoning employed be considered sound, it would be difficult to find a case of this class of legislation to which the prohibition would apply, since, to adopt the language of the court in one of these cases which is undoubtedly correct on that particular point, "for, the legislature being vested with power to make grants of that character when the public convenience demands it, the legislative judgment is conclusive, both as to the necessity of making the grant and the amount of service to be rendered in consideration therefor, and the courts have no power to interfere, however inadequate the consideration or unreasonable the grant may appear to them to be."² The qualifying clause has been left out of many state

nor deprive the company of the rights and privileges conferred. *Electric Ry. Co. v. City of Grand Rapids*, (Mich.) 47 N. W. 567.

¹ *Spelling, Priv. Corp.* § 1040; *Charles River Bridge v. Warren Bridge*, 11 Pet. 535, 549; *Shorter v. Smith*, 9 Ga. 517; *Piscataqua Bridge Co. v. New Hampshire Bridge Co.*, 7 N. H. 68; *Turnpike Co. v. State*, 3 Wall. 210; *Bradley v. South Carolina Phosphate Co.*, 1 Hughes, 72; *Monongahela B. Co. v. B. & P. Ry. Co.*, 114 Pa. 478; 8 A. 233; *Stein v. Bienville W. S. Co.*, 34 F. 145; *Tuckahoe Canal Co. v. Tuckahoe, etc. R. R. Co.*, 11 Leigh, 42; *Rockland W. Co. v. C. & R. W. Co.*, 80 Me. 544; 15 A. 785; *Illinois, etc. Canal Co. v. Chicago, etc. R. R. Co.*, 14 Ill. 314.

² *Gordon v. Winchester Building, etc. Ass'n*, 12 Bush (Ky.), 110, per

constitutions, but it would seem that the intention of the framers of a constitution containing it was to change the law as it had before existed, and by the words "public service" they meant some substantial benefit arising from special agreement, and not a mere abstract public accommodation or convenience, and that such intention should control its construction.¹ In harmony with this latter view where an outright grant was made to a gas company of the exclusive right to occupy and lay down gas-pipes in the streets of a city, no corresponding duties or obligations being imposed upon the gas company, it being provided that the right should be exclusive except against such other persons as might be authorized by the legislature, such provision was held as constituting a monopoly not entitled to protection in equity, and an injunction to prevent another corporation from laying down its pipes was refused.² But it was held in Kentucky, that a gas company asserting an exclusive right under its charter to manufacture gas in a city was entitled to protection in equity, and that the bill to enjoin a rival company from interference with plaintiff's right should be entertained; the jurisdiction resting upon the necessity of preventing a cloud upon the title.³

§ 781. **Further as to Character of the Right to be protected.**—Franchises are of many kinds and degrees of value; but whatever be the nature of a franchise or the subject to which it appertains, its owner when possessing an exclusive title will be protected by injunction against interference in its enjoyment; nor is it important whether the owner be a corporation or a natural person. An injunction was granted to protect a grantee under letters patent from the crown in the enjoyment of an exclusive right of fishing in a river.⁴ So when a water company has the exclusive right of supplying water to the inhabitants of a given locality or community, it may enjoin another company from engaging in the same business in the same locality.⁵ But courts of

Coffey, J.; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683; Const. of Ky., 1799, art. 10, § 1.

¹ *Spelling, Priv. Corp.* § 1041.

² *Norwich Gas-Light Co. v. Norwich City Gas-Light Co.*, 25 Conn. 19.

³ *Citizens' G. L. Co. v. Louisville G. Co.*, 81 Ky. 263. See also *City of Newport v. Newport L. Co.*, 84 Ky. 166.

⁴ *Ashworth v. Browne*, 10 Ir. Ch. 421.

⁵ *Williamsport W. Co. v. Lycoming G. & W. Co.*, 95 Pa. St. 35; *Stein v. Bienville W. S. Co.*, 32 Fed. Rep. 876.

equity will not, upon a bill in the nature of a bill of peace, decree a perpetual injunction for the establishment or the enjoyment of the right of a party who claims, in contravention of a public right, an exclusive right to a highway or to a navigable river.¹

§ 782. **The Allegations.** — The complaint must show clearly the title to and possession of an exclusive franchise. It must also set forth specifically the acts by the defendant constituting an infringement of complainant's right. And where a petition for injunction alleged that the plaintiff was a corporation duly organized to manufacture and vend gas; that defendant gas company claimed that its franchise was exclusive, and publicly asserted that plaintiff had no franchise to erect works or sell gas, and threatened to invoke all means possible to prevent it from doing so; that by reason thereof the plaintiff's credit, business, and franchise were irreparably injured, it was held, that the facts did not present a ground for equitable relief.² On the other hand, a complaint may show, on general equitable principles, that complainant is entitled to protection in the use and enjoyment of a franchise which is not exclusive in its character. Thus, two railroad companies, one a lessee and the other the lessor of a railroad company, may have an injunction to prevent third persons from infringing the franchises and rights forming the subject of the lease. And the lessors and lessees, together the whole legal ownership of the rights to be protected, may properly join as complainants. And as the property belongs to the stockholders whom the complainants represent, the defendants, being wrongdoers, cannot set up the alleged uncertainty of legal relations between the complainants, to justify their own wrongful acts, or to prevent the appropriate relief.³

§ 783. **Exclusive Rights conferred by Private Contract.** — Analogous to the jurisdiction to protect the enjoyment and possession of franchises is that exercised to protect one to whom an exclusive right of a public character was therein guaranteed by another from interruption or infringement thereof by sufferance or at the hands of the grantor of such right. Thus, where a hotel proprietor has granted one telegraph company the exclusive priv-

¹ *City of Chicago v. Wright*, 69 Ill. 818.

² *Consumers' Gas Co. of Kansas, City v. Kansas City Gas-Light & Coke Co.*, 100 Mo. 501; 18 S. W. 874.

³ *Pennsylvania R. R. Co. v. National Railway Co.*, 28 N. J. Eq. 441.

ilege of establishing and operating an office upon his premises equity will interfere by injunction to prevent a breach of the contract in the form of an extension of the same facilities to another and a rival company; the remedy at law of the party having the first and unquestioned right being inadequate.¹ And where a bridge is leased and the lessor retains certain rights which are greatly injured and impaired by the acts complained of, an injunction will be allowed to restrain such improper use of the property constituting the subject of the lease. In such case, the public may be so far injuriously affected by the issues of the property, as where it is a bridge over which there is considerable public travel, as to constitute such misuse a nuisance, and an injunction will be granted to restrain its further maintenance.² So a railroad company may contract with a palace car company, giving it the exclusive right to furnish cars for use on its road for a term of years. But a court of equity will not, by injunction, restrain the railroad from breaking the contract, where it would unreasonably tax the time and resources of the court for a term of years; and the contract being the grant of a monopoly, a court of equity will exercise its discretion in restraining or refusing to restrain its breach.³

Where the exclusive right is claimed under a written contract or instrument, the complainant will be required to produce the same in evidence or to furnish satisfactory reasons for its non-production. Unless he produce it, or assign satisfactory reasons for its absence, he will not be entitled to an injunction.⁴

§ 784. **Exclusiveness of Right must be shown.** — As a rule, equity

¹ *Western Union Tel. Co. v. Rogers*, 42 N. J. Eq. 311; 11 A. 13.

² *Niagara Bridge Co. v. Great Western R. Co.*, 39 Barb. 212.

EXCLUSIVE USE OF TELEGRAPH WIRE. — By the terms of a contract made between a telegraph and railroad company, and approved by the governor of Georgia, the telegraph company was to put up its wires along the railroad, and allow the exclusive use of one wire to the railroad company, which was to pay the costs of constructing the same, said wire to run into all the offices of the telegraph company. Another company located the road under a lease from the state of Georgia, the state paying the telegraph company the costs incurred for the wire set apart for the use of the railroad. *Held*, that the telegraph company owned said wire, and could enjoin the second railroad company from using it in a manner inconsistent with the contract. *Western Union Tel. Co. v. Western & Atlantic R. R. Co.*, 8 Baxter (Tenn.), 54.

³ *Pullman Palace Car Co. v. Texas & Pacific Ry. Co.*, 4 Woods C. Ct. 317.

⁴ *Hankey v. Abrahams*, 28 Md. 589.

will not lend its aid for the protection of franchises and privileges which may be granted to and enjoyed by others equally with complainant against fair competition ; and the latter will usually be required to establish an exclusive right to the franchise, and one whose exclusiveness is not dependent upon mere implication from the language of the statute granting it.¹ The doctrine that in order to entitle one to equitable protection in the enjoyment of a franchise no express legislative grant was necessary, was announced at an early date by Chancellor Kent.² But notwithstanding the opinion of such eminent authority, a different view soon afterwards was taken even in New York.³ And the later view has had the support of a long line of decisions, beginning with the celebrated Charles River Bridge case, decided by the supreme court of the United States.⁴

§ 785. **When Future Legislation not forestalled.** — Where a franchise has not been made exclusive by the express terms of the grant, the legislature may convey a valid grant to conflict with one previously granted. A railway company may be incorporated and authorized to construct its line through the same valley with a canal previously incorporated by a charter not exclusive in its terms ; and the railway company will not be enjoined from constructing bridges across the canal, if the same are necessary to enable it to connect the termini named in its charter.⁵ So where a city grants to a street railroad company the right to maintain and operate a railway in the streets, it cannot, without express legislative authority, make the grant exclusive of other companies ; and the company owning the first franchise will not be entitled to enjoin other companies from constructing and operating lines of street railroad on the same streets.⁶

§ 786. **Same Subject — Disputed Right.** — A preliminary injunction will not be granted to protect an exclusive corporate privilege, unless the privilege and its exclusiveness be indisputably established.⁷ Equity will not, in the protection of a franchise, any

¹ *Butt v. Colbert*, 24 Tex. 355.

² 3 Kent's Com. 459 ; *Croton Turnpike Co. v. Ryder*, 1 Johns. Ch. 611 ; *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. 101.

³ *Auburn & Cato P. R. Co. v. Douglas*, 9 N. Y. 444.

⁴ *Charles River Bridge v. Warren Bridge*, 11 Pet. 420.

⁵ *Tuckahoe Canal Co. v. Tuckahoe Ry. Co.*, 11 Leigh, 42.

⁶ *Birmingham & P. M. S. R. Co. v. Birmingham S. R. Co.*, 79 Ala. 465.

⁷ *Jersey City Gas-Light Co. v. Consumers' Gas Co.*, 40 N. J. Eq. 427 ; 2 A. 922.

more than in other cases, lend its extraordinary remedy where the rights involved are disputed and doubtful; and this rule applies as well to the question whether an exclusive right has been, in fact, granted as to the question whether the conditions upon which it was granted and was to become vested have been performed; and where these questions depend upon matters of fact, the same must be established by clear and satisfactory proof. Thus, where a company claiming the exclusive privilege of constructing and operating a street railway in the streets of a city sought to enjoin another company from doing so, and the evidence was conflicting, and the plaintiff's right to have protected the exclusive franchise claimed was doubtful, and there was also a question whether it had complied with the conditions annexed to the legislative grant, it was held that an injunction should not be granted until the final hearing.¹

§ 787. **Same — No Prior Judgment at Law required.** — By the rules of the English court of chancery, a complainant seeking equitable protection for a franchise was required to first establish his right at law.² But this rule has never prevailed in this country, the legislative grant under which the franchise is acquired being accepted as the equivalent of a judgment at law establishing the right.³ And where there is no task of construction imposed upon the court, the legislative grant being clear and unambiguous in its meaning, equity will not require complainant's right to be first established at law. It is only in cases where a doubt exists as to the legislative intent and complainant's right is put in issue, that it will be required to be first established at law.⁴ So where persons have been granted exclusive privileges of building and maintaining a toll bridge over a river by clear and unequivocal legislative enactment, the right is sufficiently clear for the purposes of an injunction without a judgment at law, and equity will protect it from infringement by the erection of another bridge, to the prejudice of the proprietor of the first.⁵

¹ Savannah R. Co. v. Coast Line R. Co., 49 Ga. 202.

² Whitchurch v. Hyde, 2 Atk. 391.

³ Moor v. Veazie, 31 Maine, 360; Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 35.

⁴ An injunction was refused where sought to protect a legal right to an exclusive franchise to lay pipes in the streets of a city, such right being disputed and never having been determined in an action at law. Atlantic City W. W. Co. v. Consumers' W. Co., 44 N. J. Eq. 427. Compare Brush Electric Co. v. Accumulator Co., (Cir. Ct.) 50 F. 833.

⁵ Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 35. See also

§ 788. **Complainant's Possession — Performance of Conditions.** — It is a well established rule governing courts of equity in the matter of granting relief, that the complainant must, at the time of his application, be in the possession and full exercise of the franchise for which he seeks protection; nor will the court interfere for the protection of a franchise to which a good title from the state cannot be shown. Accordingly, where conditions are annexed to the grant from the state which the complainant has failed to perform, he will not be allowed to restrain others from performing such conditions and accepting and exercising the franchise under legislative enactment.¹ But a party in actual possession of an exclusive privilege claiming title will not be restrained by injunction from the exercise of his privilege, at the suit of a party who merely denies the right of the defendant without setting up any in himself.²

§ 789. **Positive Injury from Wrongful Acts must be shown.** — To entitle a complainant to equitable protection in the enjoyment of an exclusive franchise, he must clearly show that the undertaking which he seeks to enjoin not only has in view the impairment of his franchise, but that such would be the necessary result of allowing it to proceed. Mere apprehension of injurious results is not sufficient to warrant the relief, especially where the work which it is sought to prevent may be undertaken for a legitimate purpose. Thus, where the complainants were by their charter vested with a franchise for the transportation, by rail, of freight and passengers between two cities, although they were entitled to an injunction against an actual infringement of such franchise, yet they were not entitled to have enjoined two other corporations from uniting their roads and forming a continuous line between the two cities. It was considered that the union of the two corporations in a rival enterprise might be for a legitimate purpose, and that the fact that the profitableness of complainant's enterprise might be endangered did not authorize an injunction, since equity will not restrain the carrying out of a rival enterprise, having in view a legitimate object, merely because such enterprise

Livingston v. Van Ingen, 9 Johns. (N. Y.) 507. An injunction to restrain the collection of tolls upon a road claimed to be out of repair will not be granted at the instance of one who has no greater interest than that of the public in general. *Sidener v. Haw Creek Turnpike Co.*, 91 Ind. 186.

¹ *Enfield T. B. Co. v. Connecticut R. Co.*, 7 Conn. 51.

² *Lansing v. North River Steamboat Co.*, 7 Johns. (N. Y.) 165.

may be perverted to an unlawful purpose.¹ And where, upon the proofs, it was doubtful whether an injury had been in fact suffered, it was held, that an injunction would not lie in favor of a street railway company to restrain another from laying a double track on the same street, in the absence of a showing that complainant company would be thereby injured and interfered with in its operations.² But it seems that in the absence of any legislative authority whatever for the construction on the same street of a competing line, the existing street railway company already occupying it will be entitled to an injunction without any showing of special injury, such unauthorized construction being regarded as an attempted exercise of a valuable franchise which is *prima facie* injurious.³

§ 790. **Considerations of Public Convenience and Inconvenience.**— In this class of cases as in others, where the public is considerably interested in the subject matter of the application for an injunction, the court may very properly take into consideration the relative convenience and inconvenience, not only to the immediate parties, but also to the public generally; and notwithstanding a clear legislative grant of the franchise where no irreparable mischief is alleged as likely to result from the continuance of the acts complained of, the court may, in the exercise of its discretion, withhold the relief. And in cases where there is considerable doubt as to the complainant's legal right to an exclusive franchise, the court will hesitate to interfere where to grant the relief prayed would be to pronounce an opinion in favor of the legal right in advance of a trial at law; but it should require defendant to keep an account until the legal right can be determined, and leave should be given the complainant to apply again for an injunction.⁴ And it was held that a temporary injunction granted in such case in favor of a water supply company should restrain the defendant from injuring, or in any way interfering with, any pipes, conduits, or mains, constructed pursuant to an agreement between a city and plaintiff's testator, under which the exclusive

¹ Delaware, etc. R. Co. v. Camden & A. R. Co., 2 McCart. 1.

² New York & H. R. Co. v. Forty-second Street R. Co., 50 Barb. 285. See also Brooklyn R. Co. v. Coney Island R. Co., 35 Barb. 364.

³ People v. Third Ave. R. Co., 45 Barb. 63. See also St. Louis R. Co. v. Northwestern St. L. R. Co., 69 Mo. 65.

⁴ Cory v. Yarmouth & N. R. Co., 3 Hare, 593. See also Stein v. Bienville Water Supply Co., 32 F. 876.

right was granted to the latter to supply the city with water for twenty years, or until the city should redeem his works built for that purpose.¹

§ 791. **Nature of Interference immaterial.** — The acts against which an injunction will be granted are only such as actually interrupt the beneficial exercise of the franchise, as by taking from its owner a portion of the emoluments which he would otherwise receive. Thus, it is held that persons will not be enjoined from using their own boats for the transportation of themselves and families, so long as the public are not permitted to use them.² But it is immaterial in this class of cases for what purpose and by what means an actual infringement is accomplished; nor is it important that the defendant derives no profit from his acts of interference with complainant's right. Thus, where defendant, a railway corporation, allowed persons to travel and vehicles to run over its bridge without payment of tolls, whereby complainant's franchise in his toll bridge, near at hand, was impaired, an injunction was granted to restrain further use of the railway bridge for the passage of any persons or vehicles for which complainants were entitled to take toll.³ And it is not required, in order to entitle the owner of an exclusive ferry franchise to protection by injunction, that the infringement should consist in an enterprise of the same character, or that an opposition ferry should be started. The erection of a bridge in such close proximity to the ferry as to endanger its profits and jeopardize the exclusive right of its owner, constitutes sufficient ground for enjoining the rival enterprises.⁴

§ 792. **Same — Wrongs which Equity will restrain.** — Nor is it necessary that the beneficial enjoyment of a franchise shall be actually taken away or destroyed by competition; any other interferences tending to render it useless may be enjoined. Thus, a railroad company to which has been granted the right to load and unload freight on the streets of a city, may enjoin the enforcement of an ordinance prohibiting the further enjoyment of the right.⁵

¹ *Stein v. Bienville Water Supply Co.*, 32 F. 876.

² *Trent v. Cartersville B. Co.*, 11 Leigh, 521; *Hunter v. Moore*, 44 Ark. 184.

³ *Thompson v. New York & H. R. Co.*, 3 Sandf. Ch. 625. See also *Osborn v. United States Bank*, 9 Wheat. 738.

⁴ *Gates v. McDaniel*, 2 Stew. 211. Compare *Mason v. Harper's Ferry B. Co.*, 17 West Va. 396.

⁵ *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 115. See also *City Council of Montgomery v. Louisville & N. R. Co.*, 84 Ala. 127.

So relief may be granted where the injury to the franchise is a simple trespass, if no adequate remedy for the same is provided at law. Thus, it was held that the destruction of toll gates and forcible interference with the collection of tolls, although amounting to a mere trespass, was such an injury as could not be adequately compensated in damages in an action at law, and was therefore a proper case for an injunction.¹ And relief was granted in favor of a turnpike company to secure the enjoyment of their right to collect tolls by preventing the establishment of turnpikes.² But the wrong complained of must be such as constitutes an infringement of complainant's franchise, and the fact that a rival company is supplying a poorer quality of gas than that required by the law under which it is incorporated, is not ground for an injunction.³

§ 793. **Diligence of Complainant in seeking Protection.** — The general rule requiring due diligence on the part of complainants seeking relief by injunction and holding them estopped by unnecessary and inexcusable delay therein and by acts of acquiescence, has special application to this class of cases. Thus, where the complainant, an incorporated bridge company, having been granted a franchise to construct and maintain a bridge, has acquiesced for a number of years in the construction and maintenance under municipal authority of a bridge within the limits of immunity from competition, fixed in complainant's charter, and has assisted in repairing the bridge so constructed and maintained, it was held estopped from enjoining the replacing of such competing bridge when again destroyed.⁴ And if complainant has been guilty of laches or has lain by while investments and expenditures were being made, and permitted, for a long period, the construction of works to proceed at heavy cost without objecting to the same, an injunction will be refused; as where the grievance complained of consists in the construction of a road in such manner as to impair complainant's franchise.⁵ So the owner of a

¹ *Justices v. Griffin & W. P. P. R. Co.*, 11 Ga. 246. See also *Stage Horse Cases*, 15 Abb. (N. Y.) Pr. n. s. 51.

² *Croton Turnpike Company v. Ryder*, 1 Johns. Ch. 615. See also *Williams v. N. Y. Central Railroad Co.*, 18 Barbour, 222; *Hentz v. Long Island Railroad Co.*, 13 Id. 646; *Auburn & Cato Plank Road Co. v. Douglass*, 12 Barbour, 553; *Harrell v. Ellsworth*, 17 Ala. 576.

³ *Jersey City G. Co. v. Consumers' G. Co.*, 40 N. J. Eq. 427.

⁴ *Fremont F. & B. Co. v. Dodge Co.*, 6 Neb. 18.

⁵ *South Carolina R. Co. v. Columbia & A. R. Co.*, 13 Rich. Eq. 339.

franchise may so far neglect or abuse his right as to entitle others and the public generally to disregard it. Thus, where the complainant had allowed their bridge to be so far appropriated by a railroad company as to render it dangerous to the travelling public for its original purposes as a toll bridge, an injunction for its protection was withheld.¹

§ 794. **Relief barred by Neglect of Public Duties.**—A complainant seeking relief against infringement of an exclusive franchise will be required to show not only that he comes in due time to assert his right, but also that he has not been remiss in his duties to the public connected with the possession and exercise of the exclusive privilege, since inattention and negligence with respect to such duties will estop him from asserting that others shall not exercise and enjoy the right. In such case it is held, that while there can be no forfeiture at law (except, perhaps, in the case of total non-user for the prescriptive period) otherwise than by a judgment in an action by the state, yet in equity such gross carelessness and inattention to the duties incumbent upon a complainant in connection with the franchise as the court deems sufficient to authorize a forfeiture at law, will warrant a refusal of relief in equity against infringement.²

§ 795. **Same — Failure to perform Conditions.**—And where a franchise is granted upon condition that certain acts shall be done by the grantee, negligence in the performance of such condition may deprive such grantee of his right to relief in equity against the infringement of his exclusive right. Thus, where a bridge company has been granted a franchise to erect and maintain a bridge subject to the condition that it shall provide certain locks, which it has wholly neglected to construct, and it is by a subsequent act of the legislature released from the duty of building the locks, such company will not be allowed to enjoin others who are proceeding under statutory authority to construct the locks.³ But where, in a suit to restrain a plank-road company from taking toll, on the ground that its road is defective and out of repair, it appears that since the filing of the bill the defendant has, at great expense, put its road in the condition required by law, an injunction is properly refused.⁴

¹ *President v. Trenton C. B. Co.*, 2 Beas. 46.

² *Ferrell v. Woodward*, 20 Wis. 458. See also *Trent v. Cartersville B. Co.*, 11 Leigh, 521.

³ *Enfield T. B. Co. v. Connecticut River Co.*, 7 Conn. 51.

⁴ *People v. Grand Rapids & W. Pl. R. Co.*, 67 Mich. 5; 34 N. W. 250.

§ 796. **Abuses of Franchises redressed by State.**—Where the purposes for which a franchise is granted are rather public than for private gainful objects, redress for injuries resulting from their abuse must be sought in an action prosecuted in the name of the state, or at law for damages, and not through a suit in equity by injunction.¹ Accordingly, an injunction was refused where sought to restrain a boom company whose franchises were granted for the purpose of enabling it to construct and maintain booms for receiving logs upon a navigable river, from so constructing its works as to impede navigation, since to have allowed such action would have been a subordination of public rights to the redress of private grievances.² But while the remedy for usurpation and abuse of franchises lies at law in the name of the state, yet, in a case proper for equitable relief by injunction, it is not necessary that the right should have been first established and the proceeding instituted on the part of the state; and an injunction will lie in behalf of persons aggrieved by the infringement of corporate franchises even of a public character as a matter of private right.³

§ 797. **Remedy at Law — Generally.**—The existence of a remedy at law, here as elsewhere, will render it the duty of the court of equity to which an application for an injunction is made to refuse the same.⁴ And an act of Parliament granting letters patent to a citizen authorizing him during a given period to maintain a theatre in a city and prohibiting any one from acting in any theatre for which no patent has been granted, under a penalty to be recovered by any one suing for the same, was held not to confer an exclusive franchise entitling the grantee to equitable protection. The statutory action for the penalty was considered as an adequate means of protection as well as compensation at law for a violation of complainant's right.⁵

¹ *Cumberland, etc. R. Co.'s App.*, 62 Pa. St. 218. See also *Biglow v. Hartford Bridge Co.*, 14 Conn. 565; *Passenger R. Co. v. Passenger R. Co.*, 1 W. N. C. (Pa.) 492; *Buck Mountain, etc. Co. v. Lehigh, etc. Co.*, 14 Wright (Pa.), 91; *Sparhawk v. Union, etc. R. Co.*, 4 P. F. Smith (Pa.), 401; *Peterson v. Railway Co.*, 5 Phila. (Pa.) 199; *Crowley v. Davis*, 68 Cal. 460; s. c. 20 Am. & Eng. R. R. Cas. 25; *Dwenger v. Chicago, etc. R. Co.*, 98 Ind. 153; s. c. 20 Am. & Eng. R. R. Cas. 26, 30.

² *Cohn v. Wausau Boom Co.*, 47 Wis. 314.

³ *Putnam v. Sweet*, 1 Chand. 288.

⁴ *Long v. Merrill*, N. C. Term R. 112; *Power v. Village of Athens*, 19 Hun, 165.

⁵ *Calcraft v. West*, 2 Jo. & Lat. 123.

§ 798. **Interference by State.** — The rule that courts of the United States have no jurisdiction to interfere with proceedings in state courts does not prevent them from granting an injunction against a public officer of the state to restrain him from proceeding under a void statute of the state to destroy a franchise created by the United States.¹ But the illegal imposition of a tax upon a franchise does not in itself constitute sufficient reasons for interference by the United States courts. Franchises are, for purposes of taxation, considered as a species of property, and the same rules govern courts of equity in cases of taxation of franchises as in other tax cases, and if the only ground relied upon for an injunction against the tax is its illegality, an injunction will be refused and the party left to his remedy at law.² As in other cases, a court of equity will interfere, however, to prevent irreparable injury; and if the result of allowing an illegal tax to be enforced would be to render the franchise useless and to destroy its value, thus rendering the legal remedy inadequate to redress the wrong, an injunction will be allowed.³

§ 799. **Action by and against Municipal Corporation.** — The same principles govern where the exclusive right to maintain and operate a ferry between two points is vested in a city; and in such case the municipal authorities may enjoin the operation of a rival ferry between the same points by parties having no authority.⁴ And in a proper case an injunction will be granted against a municipality to restrain it from interfering with the enjoyment of an exclusive franchise within its territorial bounds. Thus, an injunction was granted to restrain a county from constructing a ferry adjacent to one already established without tendering damages to the owner of the latter, it not appearing that the proper steps had been taken for condemning the property of such owner to public use.⁵

¹ *Osborn v. U. S. Bank*, 9 Wheat. 738.

² *De Witt v. Hays*, 2 Cal. 468. See *Mechanics' Bank v. Debolt*, 1 Ohio St. 591.

³ *Foote v. Linck*, 5 McLean, 616; *Woolsey v. Dodge*, 6 McLean, 142. See also *Osborn v. U. S. Bank*, 9 Wheat. 738.

⁴ *Mayor v. Storin*, 106 N. Y. 1.

⁵ *County Commissioners v. Humphrey*, 47 Ga. 565. See also *Supervisors v. McFadden*, 57 Miss. 618, where an injunction was granted to restrain the establishment of a free ferry, and taking without legal authority private property for that purpose; where, in a bill to enjoin the usurpation of the complainant's right to a ferry, the complainant described himself as lessee of the

§ 800. **Essential Property protected.** — The protective powers of a court of equity will be extended not only to restrain acts having a direct tendency to interrupt and interfere with the profitable exercise of the franchise, but to prevent trespasses upon, and other disturbances of, the possession and enjoyment of property owned in connection with it. Thus, the owner of a ferry franchise will be entitled to have enjoined the laying out of a public road through grounds adjoining his dock or landing, such grounds having been used by him for a long period of years in connection with his ferry, the same being necessary for its beneficial use.¹ And a street railway company in the enjoyment under its charter of a franchise of operating its line over the streets of a city, will be granted relief by injunction against a coach company which without authority is using complainants' tracks by running its coaches thereon, in competition with complainants in the business of carrying passengers and property.²

§ 801. **Protection of Ferry Franchises.** — The right to maintain a ferry is a franchise, whether the right be vested in a corporation or in an individual; and where such right is exclusive an injunction will be granted to restrain any unauthorized interference or interruption of it, to prevent both irreparable injury and multiplicity of suits.³ And where it appeared that a commissioners' court which had granted the exclusive franchise upon which a prayer for an injunction was based had no power to grant it, it was nevertheless held, in a suit to enjoin the operation of a rival ferry, that plaintiffs, on showing that they were licensed by law to operate their ferry, and had paid their tax, and that defendant had no license, were entitled to an injunction.⁴ But where plaintiff, claiming an exclusive ferry franchise, seeks to have defendant

ferry from the commissioners of the seat of justice in Bibb County (Alabama), a body corporate to whom the ferry was granted, the complainant, to be entitled to relief, must prove the corporate charter of the commissioners, and a lease from them to him, where these facts are put in issue by the answer. *Carter v. Garratt*, 13 Ala. 728.

¹ *Flanders v. Wood*, 24 Wis. 572.

² *Camden Horse R. Co. v. Citizens' Coach Co.*, 31 N. J. Eq. (4 Stew.) 525.

³ *McRoberts v. Washburne*, 10 Minn. 23; *Midland T. & F. Co. v. Wilson*, 28 N. J. Eq. (1 Stew.) 537; *Hazelip v. Lindsey*, (Ky.) 18 S. W. 832; *City of Laredo v. Martin*, 52 Tex. 548. And see *Broadnax v. Baker*, 94 N. C. 675; *Mason v. Harper's Ferry B. Co.*, 17 West Va. 396; *Power v. Village of Athens*, 99 N. Y. 592; *Conway v. Taylor*, 1 Black, 603.

⁴ *Tugwell v. Eagle Pass Ferry Co.*, 74 Tex. 480; 18 S. W. 654.

enjoined from operating his ferry, and it appears that defendant, instead of plaintiff, is entitled to an injunction, all the equities growing out of the facts alleged in the pleadings and litigated may be adjudged, and defendant may be granted the affirmative relief of an injunction against plaintiff.¹

§ 802. **Same — Railroad Franchise.** — The jurisdiction will be exercised for the protection of exclusive rights in case of railroads; and where complainant's road had been incorporated under an act of the legislature, which provided that no other road should be constructed within a given period after the passage of the act, there being no question concerning the constitutionality of the act, it was held to create a contract between the corporation and the state, the violation of which by the operation of the rival road would be enjoined.² And where the state has created a corporation and conferred upon it the exclusive right to construct and operate a railroad between designated termini, such company will be entitled to an injunction to restrain any other corporation claiming the right to construct a rival and competing road between the same points.³

§ 803. **Same — Bridge Franchise.** — A similar contractual relation exists between the state and a bridge company upon which an exclusive right of taking tolls has been conferred by charter; and when such right has been clearly established at law and made to appear by competent evidence in a court of equity, it will be protected by injunction against interference and infringement. In such cases courts proceed upon the principle that the charter constitutes a contract between the public and the corporation, the consideration for the exclusive right being the assumption by the corporation of certain burdens, which being fulfilled, the corporation is entitled to equitable protection against the violation of the contract.⁴ So where, by the terms of complainant's charter, it was granted an exclusive privilege to construct and maintain a toll bridge, and guaranteed against the erection of another bridge within three miles of the one to be constructed under the charter,

¹ *Power v. Village of Athens*, 99 N. Y. 592; 2 N. E. 609.

² *Boston & L. R. Co. v. Salem & L. R. Co.*, 2 Gray, 1; *Boston Water P. Co. v. Boston & W. R. Co.*, 16 Pick. 512. See *Central B. Co. v. Lowell*, 4 Gray, 474.

³ *Pennsylvania R. Co. v. National R. Co.*, 8 C. E. Green, 441.

⁴ *Hartford B. Co. v. East Hartford*, 16 Conn. 149; *Enfield T. B. Co. v. Hartford & N. H. Co.*, 17 Conn. 40.

it was held a court of equity might properly enjoin the construction and continuance of another bridge within the limits specified.¹

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§ 804. Obvious Necessity for Equitable Interference. — The jurisdiction of courts of equity to protect by injunction the rights of parties to the beneficial use and enjoyment of patents, copyrights, and trade-marks rests on such obvious grounds as scarcely to require explanation. "It is quite plain," says Justice Story,

¹ *Micon v. Tallahassee Bridge Co.*, 47 Ala. 652.

“that if no other remedy could be given in cases of patents and copyrights than an action at law for damages, the inventor or author might be ruined by the necessity of perpetual litigation, without ever being able to have a final establishment of his rights.”¹ Another consideration of equal weight is that the plaintiff in such cases can at law have no preventive remedy against the wrongful use of his invention or trade-mark, or publication of his production in the future, however injurious to his title and interest. In supplying this defect in remedial justice as administered at law, and furnishing a remedy commensurate with the necessities of the case, we have one of the plainest instances of the wholesome and beneficial uses of injunction in accomplishing the purposes of justice. Formerly (and the same is still true, within those injunctions where a bill of discovery is necessary in order to ascertain the amount of sales already made) the main relief sought was an accounting and an injunction to restrain future infringement as an incident to that relief. In such case the bill seeks an account of the books printed, or of the profits which have arisen from the use of the invention, from the persons who have pirated or infringed the same. And even where the common law disqualification on account of interest has been removed, dispensing with the necessity for bills of discovery, a court of equity, having acquired jurisdiction to furnish preventive relief against future violations of the right, will retain the cause and ascertain the amount due for past infringement; and this account will in all cases, when the right has been already established under the direction of the court, be decreed as incidental, in addition to the relief by perpetual injunction.²

¹ Story's Eq. Jur. 931, 932, citing *Harmer v. Plane*, 14 Ves. 132; *Hogg v. Kirby*, 8 Ves. 223, 224; *Lawrence v. Smith, Jacob*, 472; *Sturz v. De la Rue*, 5 Russ. 322; *Wilkins v. Aikin*, 17 Ves. 424.

² Mitf. Eq. Pl. by Jeremy, 138; *Eden on Injunct.* ch. 12, p. 261, ch. 13, p. 364; *Hogg v. Kirby*, 8 Ves. 223-225; *Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 705, 706; *Bailey v. Taylor*, 1 Russ. & Mylne, 73; *Sheriff v. Coates*, 1 Russ. & Mylne, 159; *Geary v. Norton*, 1 De G. & S. 9. “It removes from him the danger of an irremediable injury, precludes the necessity of innumerable suits for his successive wrongs, and interposes in the path of the infringer an obstacle which he cannot overcome. It is the proper complement of that legislative action which confers upon the inventor his exclusive privilege, — the one prohibiting all interference with his monopoly, the other practically enforcing this prohibition against individual transgressors; and could the patentee be always forewarned of the intended invasions of his rights, and were he vigilant in seeking this form of relief, no other litigation

§ 805. **Jurisdiction of Federal Courts exclusive.** — The power to grant patents for invention and copyrights for literary and other productions, such as works of art, is by the constitution vested exclusively in Congress, and the equitable jurisdiction for the protection of these rights is vested exclusively in the federal courts, the state courts being devoid of jurisdiction.¹ Some doubt existed under the act of Congress, 1819, as to whether the jurisdiction in patent cases which it conferred was exclusive of the state court;² but all doubt was removed by the act of 1836.³ State courts have undoubted jurisdiction to determine questions of title or of contract rights pertaining to letters patent, but have none to restrain an infringement, even as an incident to an action growing out of contracts relating to patents.⁴

§ 806. **Complainant's Legal Right; Patent as Evidence.** — This extraordinary relief is never granted as a matter of course on filing a bill and producing a patent. The patent itself, although in a certain sense it is *prima facie* evidence of the validity of the grant, is never sufficiently strong *per se* to warrant the granting of a perpetual injunction on a mere motion. The title of the patentee must, in order to obtain this relief, always be strengthened by exclusive possession for some period of time, or by an adjudication in which the validity of the patent has been sustained.⁵ The sanction or opinion of the patent office in favor of

would ever be required. An injunction is thus the strong arm of the court, at once prompt in its action and effective in its results, never to be employed when other remedies are adequate, but applied unhesitatingly and without restriction wherever the plaintiff cannot otherwise escape irreparable or repeated injuries." Robinson on Patents, § 1168. See also *Wilson v. Barnum*, 2 Fisher, 635; *Ely v. Monson & Brimfield Mfg. Co.*, 4 Fisher, 64. Where the only question at issue is as to infringement, which is shown by the uncontradicted testimony of an expert, an injunction and an accounting will be decreed. *Tsheppe v. Bernheim*, 42 F. 59.

¹ *Parkhurst v. Kinsman*, 2 Halst. Ch. 600; U. S. Rev. St. 1874, § 4921. See *Yuengling v. Johnson*, 1 Hughes, 607.

² See *Burrall v. Jewett*, 2 Paige, 134.

³ *Gibson v. Woodworth*, 8 Paige, 132; *Parkhurst v. Kinsman*, 2 Halst. (N. J.) Ch. 600; *Dudley v. Mayhew*, 8 Comst. (N. Y.) 9; Rev. St. U. S. 4921, which confers power on courts having jurisdiction of patent cases to grant injunctions to prevent the violation of any right "secured by patent," does not confer any authority on such courts to issue an injunction in favor of one who has failed to secure a patent. *Illingworth v. Atha*, 42 F. 141.

⁴ *Continental S. S. Co. v. Clark*, 100 N. Y. 365.

⁵ *Tappan v. National Bank Note Co.*, 2 Fisher, 195; *Grover & Baker Sewing Machine Co. v. Williams*, 2 Fisher, 133; *Hockholzer v. Eager*, 2 Sawyer,

his right is not alone sufficient, though that opinion, since the laws were passed requiring some examination into the originality and utility of inventions, possesses some weight. But the complainant must furnish some further evidence of a proprietary right; and though it need not be conclusive evidence, else additional hearing on the bill would thus be anticipated and superseded, yet it must be something stronger than the mere issue, however careful and public, of the patent conferring an exclusive right; as in doing that there is no opposing party, no notice, no public use, no trial of his rights with any one.

§ 807. **Same — The Usual Practice.** — The rule as to the production of additional evidence may be thus stated: If the patentee, after the procurement of his patent conferring an exclusive right, proceeds to put that right into exercise or use for a considerable period without its being disturbed, that circumstance greatly strengthens the probability that the patent is valid, and renders it so likely as alone often to justify the issue of an injunction to aid it. After that it becomes a question of public policy, no less than private justice, whether such a grant of a right, exercised and in possession so long, ought not to be protected until avoided by a full hearing and trial.¹ Suits in a very large proportion of patent cases are but means of appeal to the courts from the action of the patent office. Yet, while this is so, that action must always carry great weight with the courts. It is always very strongly persuasive with them. Patents are the results, generally, of contests

361. Compare *Parker v. Brant*, 1 Fisher, 58; *Sickels v. Youngs*, 3 Blatch. 293; *Many v. Sizer*, 1 Fisher, 31; *Potter v. Fuller*, 2 Fisher, 251. In *Kirby Bung Mfg. Co. v. White*, 5 Bann. & A. 263, Treat, J., delivering an opinion, said: "For the purposes of a provisional injunction under the patent law, two things, or either of two things, may exist, to wit, as in this case, a court, after full consideration of the matter, has rendered a final decree upholding the validity of the patent. That is sufficient basis in itself for an injunction or some form of a restraining or accounting order, provided the party defendant in the particular case has infringed the patent. In other words, the court, on a motion for a provisional injunction, does not go into the merits to ascertain the validity of the patent. *Prima facie* the patent is valid. But under the uniform rulings of the courts of the United States for more than half a century, if there has been no decision as to the patent by a United States court on the merits the party is driven to show that his patent went into use undisputed for a sufficient time to raise a *prima facie* case in his favor. But if the court, after a due consideration of the matter, has reached the conclusion that the patent is valid, on this provisional matter the inquiry is not open."

¹ *Orr v. Littlefield*, 1 W. & M. 13, per Woodbury, J.

between accomplished experts, and after such contest of the matured judgment of officers selected and appointed by the President for their extraordinary competency and skill; and the action of the patent office is sufficient to make such a *prima facie* case as to justify the action of a court on almost any motion for a preliminary injunction.¹

§ 808. **Same — Prior Judgment at Law.** — The rule as to granting or continuing injunctions in patent-right cases is now well settled by the modern usages of the courts of the United States. They are now granted without a previous trial at law in cases where the owner of the patent shows a clear case of infringement, and has been in the possession and enjoyment of the exclusive right for a term of years without any successful impeachment of its validity. Such possession and enjoyment, aided by the presumptions arising from the patent itself, are usually regarded as sufficient to warrant an injunction to restrain infringement.² It was formerly a rule of the English courts not to grant an injunction to protect a patent right until the right had been established at law; but this rule has been considerably modified, and injunctions are now granted upon the naked legal right, where nothing appears to cast doubt or suspicion upon it and its assertion is not denied.³ In

¹ *Yuengling v. Johnson*, 1 Hughes, 607. See also *N. E. Car Co. v. Dunbar*, 1 Fisher, 60. In *Yuengling v. Johnson*, Hughes, J., said: "When, as in the present case, the weight of expert testimony is nearly evenly balanced, a court may safely presume that the action of the patent office, taken after a sharp contest between patent lawyers and experts, is *prima facie* correct." The exercise as an uncontested exclusive right in the patentee may be proven by showing that he has manufactured and sold machines repeatedly, or has sold to others the right to make, vend, and use the thing patented, and if the public acquiesce in this exclusive exercise of his right, it affords some ground for presuming that the patent is valid.

² *Potter v. Muller*, 2 Fisher, 465, per Leavitt, J.; *Raymond v. Bolton Woven Hose Co.*, 39 F. 365. See also *Brown v. Hinkley*, 6 Fisher, 370; *Thomas v. Weeks*, 2 Paine, 92; *Sargent v. Seagrave*, 2 Curtis, 553; *Guidet v. Palmer*, 6 Fisher, 82; *Miller v. Androscoggin Pulp Co.*, 5 Fisher, 340; *Sargent v. Carter*, 1 Fisher, 277; *Isaacs v. Cooper*, 4 Wash. 259; *Sullivan v. Redfield*, 1 Paine, 441; *Brooks v. Norcross*, 2 Fisher, 661; *Shelly v. Brannan*, 4 Fish. Pat. Cas. (U. S.) 198; s. c. 2 Biss. (U. S.) 315. See also *Buchanan v. Howland*, 5 Blatchf. (U. S.) 151; *Sanders v. Logan*, 2 Fish. Pat. Cas. (U. S.) 167; *Goodyear v. Day*, 2 Wall. Jr. (U. S.) 283; *Wise v. Grand Av. R. Co.*, 33 F. 277.

³ *Universities v. Richardson*, 6 Ves. 689. See also *Hicks v. Ramcock*, Dick. 647. But it seems that even in England, if the patent has been granted for some length of time, and the patentee has put the invention into public use, and had exclusive possession of it under his patent for a period of time

this country the former English rule never was fully recognized. In the exercise by the federal courts of the jurisdiction conferred upon them by statute these courts do not generally require a verdict at law upon the title even as a condition precedent to the granting a perpetual injunction.¹ Even where a patent has been but recently granted and its validity has not been tested and established at law, the American courts will, nothing more

which may fairly create the just presumption of an exclusive right, the court will interfere by way of interlocutory injunction pending the proceedings, reserving until the ultimate decision of the cause final judgment on the merits. *Goodyear v. Day*, 2 Wallace, Jr. 283; *Hill v. Thompson*, 8 Meriv. 622, 628; *Eden on Injunct.* ch. 12, p. 260; 1 *Med. Ch. Pr.* 113; *Jeremy on Eq. Jurisd.* B. 3, ch. 2, § 1, p. 816; *Cooper Eq. Pl.* 154-156; *Universities of Oxford, etc. v. Richardson*, 6 Ves. 706, 707; *Harmer v. Plane*, 14 Ves. 130; *Caldwell v. Van Vliessengen*, 9 Eng. Law & Eq. 51. The English practice in patent cases where relief by injunction is demanded was thus explained by Lord Cottenham in *Bacon v. Jones*, 4 Mylne & Craig, 433, 436: "When a party applies for the aid of the court, the application for an injunction is made either during the progress of the suit or at the hearing, and in both cases, I apprehend, great latitude and discretion are allowed to the court in dealing with the application. When the application is for an interlocutory injunction, several courses are open: the court may at once grant the injunction, simpliciter, without more, — a course which, though perfectly competent to the court, is not very likely to be taken, where the defendant raises a question as to the validity of the plaintiff's title; or it may follow the more usual, and, as I apprehend, more wholesome, practice in such a case, of either granting an injunction and at the same time directing the plaintiff to proceed to establish his legal title, or of requiring him first to establish his title at law, and suspending the grant of the injunction until the result of the legal investigation has been ascertained, the defendant in the mean time keeping an account. Which of these several courses ought to be taken must depend entirely upon the discretion of the court, according to the case made. When the cause comes to a hearing, the court has also a large latitude left to it; and I am far from saying that a case may not arise in which, even at that stage, the court will be of the opinion that the injunction may properly be granted, without having recourse to a trial at law. The conduct and dealings of the parties, the frame of the pleadings, the nature of the patent right, and of the evidence by which it is established, — these and other circumstances may combine to produce such a result; although this is certainly not very likely to happen, and I am not aware of any case in which it has happened. Nevertheless it is a course unquestionably competent to the court, provided a case be presented which satisfies the mind of the judge that such a course if adopted will do justice between the parties. Again, the court may at the hearing do that which is the more ordinary course; it may retain the bill, giving the plaintiff the opportunity of first establishing his right at law. There still remains a third course, the propriety of which must also depend upon the circumstances of the case, that of at once dismissing the bill."

¹ *Sickles v. Gloucester Mfg. Co.*, 1 Fish. 222; *Sanders v. Logan*, 2 Fish. 167.

appearing, often require of the complainant no more than the giving of a bond of indemnity before granting the writ.¹ But under these circumstances an English court of equitable jurisdiction will not act upon its own notions of the validity or invalidity of the patent, and grant an immediate injunction, but will require its validity to be first established at law, if denied or placed in doubt by the defendant.²

§ 809. **Same Subject — Illustrations.**— But where complainant's right is disputed, an injunction does not go as a matter of course upon the production of a patent. When his right is denied under oath, to entitle a complainant to even a preliminary injunction, restraining the infringement of letters patent, there must be a special presumption in favor of the validity of the patents, arising from an adjudication in a federal court, acquiescence by the public, or a successful interference in the patent office.³ Accordingly, a preliminary injunction to restrain the manufacture of an alleged infringement of a patent was refused when the patent had never been adjudicated, and there was inadequate proof of public acquiescence, and the infringement was denied, and defendants had been engaged in the manufacture for a long time without opposition, and had an extensive business, while the complainants had owned the patent for only three months, and defendants were not shown to be pecuniarily irresponsible, and the effect of an agreement not to manufacture the patented article, signed by one of defendants, was doubtful at least as to the other defendants.⁴ On the other hand, where, in a suit to restrain the infringement of a patent, it appears that the defendant is using the precise thing described in the patent, and that patent has been acqui-

¹ *Shelley v. Brannan*, 4 Fish. Pat. Cas. 199; 2 Biss. 315.

² *Martin v. Wright*, 6 Sim. 297; *Bramwell v. Halcomb*, 3 Mylne & Craig, 737; *Spottiswoode v. Clarke*, 2 Phillips Ch. 156; *Caldwell v. Van Vlissingen*, 9 Eng. Law & Eq. 51.

³ *Edward Barr Co. v. New York & New Haven Automatic Sprinkler Co.*, 32 F. 79; *A. B. Farquar Co. v. National Harrow Co.*, 99 F. 160. In *Adriance Platt & Co. v. National Harrow Co.*, 98 F. 118, it was held that the character of circulars and other publications concerning plaintiff's patent may be so alleged as to entitle him to an injunction prior to an adjudication of validity. See also *Nathan Manuf'g Co. v. Craig*, (Cir. Ct.) 47 F. 522, holding that a complaint for the infringement of letters patent, which does not show that the invention was not in public use or on sale for more than two years prior to the application for patent, is insufficient on demurrer.

⁴ *Johnson v. Aldrich*, 40 F. 675. See also *National Cash Register Co. v. Boston Cash Indicator & Recorder Co.*, 41 F. 144.

esced in by every one except the defendant, and even by him for a long time, a preliminary injunction may issue, though there has been no prior adjudication of the validity of the patent.¹ And a restraining order, pending suit for infringement, will be granted where the patent has been fortified by one final decision in its favor, and by numerous interlocutory injunction orders granted by other courts, and there has been public acquiescence for several years in the validity of the patent.²

§ 810. **Same — Effect of Prior Adjudications — Generally.** — The weight to be attached to any judgment in favor of a patent, as evidence of its validity in future action, depends upon the identity of the parties, the identity of issues, the identity of testimony, and the authority of the tribunal by which the former controversy was decided. The judgment of a court of last resort, in a suit between the same parties, on the same issues, and on the same or equivalent evidence, is conclusive. The decision of an inferior tribunal, in a litigation between different parties or upon different issues, and without a full examination of the facts or law, is of slight or no importance. A judgment sustaining a patent may thus possess any degree of weight as proof of its validity, from absolute demonstration to a mere suggestion, according as these attributes exist, concur, and co-operate to augment or reduce its value as a precedent.³ But the fact that a court in another dis-

¹ *White v. Surdam*, 41 F. 790.

² *Schneider v. Missouri Glass Co.*, 36 F. 582. The defendant in a suit to restrain the infringement of a patent is entitled to dispute the validity of the patent, although the plaintiff has obtained a judgment at law against another person establishing its validity; but until he has proved its invalidity, he will be restrained from infringing it. *Day v. Candee*, 3 Fish. Pat. Cas. (U. S.) 9; *Consolidated, etc. Co. v. Ashton Valve Co.*, 26 Fed. Rep. 319.

³ *Rob. on Pat.* § 1175. See also *Poppenhusen v. New York Gutta Percha Comb Co.*, 2 Fisher, 74; *Barker v. Stowe*, 11 Fed. Rep. 303; *Dubois v. Philadelphia, Wilmington, & Baltimore R. R. Co.*, 5 Fisher, 208; *Matthews v. Iron Clad Mfg. Co.*, 19 Fed. Rep. 321; *Buck v. Hermance*, 1 Blatch. 822. In *Potter v. Whitney*, 3 Fisher, 77, the court, per Lowell, J., said: "Although it is the duty of the judge, in every case of this nature, where the defendant has not been a party to any former suits, to examine the case anew, and exercise his discretion upon the questions presented, yet when questions are in fact the same as in former cases, he cannot but admit those decisions as having great weight, as much as in any other case arising, for instance, in admiralty or at common law, in which the point in controversy has been passed upon and decided." On the same question see also *Page v. Homes Burglar Telegraph Co.*, 2 Fed. Rep. 330, where Blatchford, J., delivering the opinion, said: "It is well settled that after the validity of a patent has been established in a

trict in the same circuit has decreed a machine of the same style as defendant's an infringement of complainant's patent will not warrant the court in granting a preliminary injunction, where the validity of complainant's patent is questioned in the pending suit.¹ So where a prior adjudication sustaining a patent is decided on the ground that the defendant's own testimony that "he did not think there was any invention in the patent" is not sufficient to overcome the *prima facie* effect of the patent. Such decision is not sufficient to justify the issuance of a preliminary injunction restraining an alleged infringement of the patent, where the existence of an anticipating device is shown on the application for injunction by evidence which is undisputed, except by the opinion of an expert.² And in order that a prior decision may avail complainant, it must be shown to have involved the exact device or contrivance claimed by him in the suit where it is offered. Thus, a patent involving the subjection of steel springs to heat, having been before the courts, and having been sustained to the extent of covering such process "when the springs are kept below red heat," it was held, on application for preliminary injunction, that the patent would be presumed valid only to the extent expressly covered by the decisions.³

suit, and notwithstanding the presumption thereby raised that the patent is valid, it may always be shown in another suit on the patent against another defendant, and even in answer to an application for a preliminary injunction in such suit, that the right claimed by the claimant in the new suit was not, either as to its nature or its extent, fairly in controversy in the former suit, or that material facts were not known or considered when the former suit was tried, or that there are relevant matters which were not adjudicated in the former suit." As to how far comity between federal courts requires recognition and effect to be given to judgments upon questions of infringement and validity of patent, see *Pullman Palace Car Co. v. Wagner Palace Car Co.*, 44 F. 764, having special reference to *Pullman Palace Car Co. v. Boston & A. R. R. Co.*, 44 F. 195, and *Pullman Palace Car Co. v. Wagner Palace Car Co.*, 38 F. 416, and holding that the Massachusetts decision was inconsistent with the Illinois decision, and therefore comity did not require the Illinois court to enjoin an infringement of the Pullman patent on the strength of the Massachusetts decision.

¹ *Whitcomb v. Girard Coal Co.*, (Cir. Ct.) 47 F. 815; *Same v. Mt. Olive Coal Co.*, Id.

² *Jacobson v. Alpi*, (Cir. Ct.) 46 F. 767.

³ *Carey v. Miller*, 34 F. 392. But as upon the preliminary affidavits it appeared that defendants, in the process used by them, heated the springs above this limit, it was held in this case that the denial of the preliminary injunction should be with leave to renew should complainants be able to produce

§ 811. **Same** — **What constitutes *res adjudicata* herein.** — A judgment is not *res adjudicata* unless the parties are the same, and the same precise matter was involved and determined in the judgment, and if this does not appear on the record it may be shown by extrinsic evidence ; and where several matters may have been litigated, and it is uncertain which have been decided, all are open to dispute.¹ As a rule, courts should require it to be shown what claim was held to be valid, the validity of that specific claim having been brought into question. It may be that the court on final hearing passed on only one of many claims, and that the alleged infringement in such case pertained only to that specific claim. There should be a careful investigation of the precise points decided, and of the alleged infringement ; otherwise great wrongs may be perpetrated against one or the other of the parties litigant. Preliminary injunctions are not to be granted, it may be destructively to defendants, merely because an indefinite decision has been made by some court whose views are not disclosed in its decree ; nor, on the other hand, when plaintiff's rights have been fairly determined, should piracy be tolerated *pendente lite*.² If the defendant was not a party to the previous litigation, it is the duty of the court to try the merits of the case anew, notwithstanding the former adjudication. But the former decisions, if upon the identical question at issue, will be given such further evidence of defendants' process of manufacture as to indicate that complainants' patent was infringed.

¹ Russell v. Place, 94 U. S. 606.

² Coburn v. Clark, 15 Fed. Rep. 804, per Treat, J. Upon the effect of a prior judgment between the same parties as evidence of the validity, Mr. Robinson, in his valuable treatise on the law of patents, says : " The judgment of the court upon any issue of fact is always liable to error, and therefore always open to revision. Although the action in which it is rendered may be finally concluded, and no further contest be allowed on the same pleadings, yet the fact itself is never settled or beyond investigation. In other actions even between the same parties, and sometimes in proceedings supplemental to the former action, it may be again examined if the discovery of new evidence or any alteration in the attitude of the litigants towards each other should render it expedient. Hence when a previous judgment upon such an issue is offered and accepted as a precedent, it is only on the supposition that on a new trial of the question the same testimony would be produced and the same result be reached. And if in opposition to the judgment the defendant urges that the former trial did not properly disclose the facts, or that evidence not then introduced has since become attainable, the court may hear the testimony anew, and if convinced that error was committed may disregard the judgment, and decide *de novo* on the question of validity." Rob. on Patents, § 1178, citing numerous authorities.

great weight.¹ And where the questions involved depend solely on the construction of two patents which have been fully examined in many of the United States circuit courts, and an injunction at the final hearing appears to be inevitable, an injunction *pendente lite* will be granted notwithstanding laches of the complainant in asserting his rights.² It is no defence to a preliminary injunction where the machine used by defendant is clearly an infringement, that the manufacturer from whom the defendant bought it has been enjoined in another suit; and especially where it does not appear that the decree against the manufacturer was for the profits of a sale for use.³

§ 812. **Same — Same Patent but Different Parties Defendant.** — Since patents are of such extensive and general operation all over the country, and since the litigation in regard to patents has been found so expensive and so wearisome to the courts, it has become almost a matter of necessity, after the validity of a patent, as distinguished from the question of infringement, has been passed upon by a competent tribunal upon a fair hearing, to treat that decision in any future application in other courts and against other parties, as strongly persuasive of the validity of the patent; and this is especially so on the question of a preliminary injunction.⁴ “The comity of courts, however, gives

¹ *Potter v. Whitney*, 8 Fish. Pat. Cas. (U. S.) 77; s. c. 1 Lov. (U. S.) 87; *Goodyear v. Evans*, 8 Fish. Pat. Cas. (U. S.) 390; *American Bell Tel. Co. v. National Imp. Tel. Co.*, 27 Fed. Rep. 663.

² *Brush Electric Co. v. Electric Imp. Co.*, 45 F. 241.

³ *Thompson v. American Bank Note Co.*, 35 F. 203.

EFFECT OF DENIAL OF PREVIOUS MOTION. — On motion for preliminary injunction to restrain the infringement of letters patent, — *held*, that in view of the fact that in another action pending in another district of the same circuit, brought by complainant against the manufacturers from whom defendants obtain the article alleged to infringe, a similar motion had been made and denied, with leave to renew, and in view of the fact that defendants vigorously assail the validity of complainant's patent, the motion should be denied, with leave to renew when an injunction is obtained against the manufacturers. *Hicks v. Beardsley*, 32 F. 281.

⁴ *American Mid. Purifier Co. v. Christian*, 4 Dillon, 448. See also *Rob. on Pat.* § 1179; *Richardson v. Lockwood*, 4 Clifford, 128; *Wells v. Gill*, 6 Fisher, 89; *Jones v. McMurray*, 2 Hughes, 527; *Wells v. Jacques*, 5 Fisher, 136; *Rubber & Celluloid Harness Trimming Co. v. India Rubber Comb Co.*, 44 O. G. 343; *Andrews v. Hovey*, 124 U. S. 694. In *Purifier Co. v. Christian*, *supra*, Justice Miller said: “The decision of the circuit court, not to mention the supreme court of the United States in such cases, is generally — except where there are cases of collusion — the result of careful and deliberate con-

to the judgments in another circuit a degree of weight measured by the character and number of the judgments, the eminence of the judges, and the care with which the questions were considered. A judgment in another circuit on the same issues and between the same parties, if rendered after due deliberation, is usually adopted unless evidently incorrect. A concurrence of judgments in other circuits on the same issues but between different parties; the decision of any judge of recognized ability upon a question of legal definition or interpretation; a series of decisions, or even one decision, sustaining the patent against attacks in which all conceivable objections have been urged,—each of these is of sufficient influence to govern future rulings until its error is discovered.”¹

§ 813. **Same — Jury Trial — Verdict upon Facts.** — Ordinarily a verdict and judgment sustaining a patent are controlling over the discretion of a judge when he is asked to award a provisional injunction. They relieve him from the necessity of inquiring into the validity of the patent, and if he is satisfied there has been an infringement, the injunction may be said to be almost a thing of course.² The verdict of a jury in a court of law is a

consideration, either of a protracted trial before a jury, or of a careful and full hearing upon depositions before a court. The presumption, therefore, is, that the title to the patent itself, and also its validity where the latter was brought in question in such suit, was more critically and more thoroughly looked into, and decided upon better hearing and more mature consideration, than it can be in a preliminary injunction. Therefore, it may be safely stated as a general rule that wherever a patent has been established, even by the decision of the circuit court, under a careful consideration, in a subsequent application, either before the same court or any other, for a preliminary injunction or for any preliminary relief, that decision is of very great weight.” See generally *Blake v. Robertson*, 6 O. G. 297; *Rumford Chemical Works v. Hecker*, 10 O. G. 289; *Beebe v. Russell*, 19 How. 283; *Schillinger v. Cranford*, 37 O. G. 1349; *Hammerschlag Mfg. Co. v. Judd*, 28 Fed. Rep. 621; *Searls v. Worden*, 11 Fed. Rep. 501.

¹ *Rob. on Pat.* § 1181. See *Hancock Inspirator Co. v. Regester*, 35 Fed. Rep. 61; *Worswick Mfg. Co. v. Philadelphia*, 30 Fed. Rep. 625; *Steam Gauge & Lantern Co. v. McRoberts*, 26 Fed. Rep. 765; *American Bell Telephone Co. v. National Improved Telephone Co.*, 27 Fed. Rep. 663; *Cary v. Domestic Spring Bed Co.*, 26 Fed. Rep. 38; *Cary v. Lovell Mfg. Co.*, 24 Fed. Rep. 141; *Field v. Ireland*, 19 Fed. Rep. 835; *Coburn v. Clark*, 15 Fed. Rep. 804; *American Ballast Log Co. v. Cotter*, 11 Fed. Rep. 728.

² *Wells v. Gill*, 6 Fisher, 89, Strong, J. See also the opinion of Pitman, J., in *Day v. Hatshorn*, 8 Fisher, 32, where he said: “It was argued before me that if I was not satisfied with the verdict, yet if I would not have it set aside if a motion had been made for a new trial, that then I ought to grant

sufficient warrant for the grant of an injunction, but may be disregarded by the court even when not so clearly contrary to the evidence that a new trial would have been allowed. A pending bill of exceptions, or a writ of error, or a petition for another trial, impairs the force of such verdict, and the court should not receive it as a ground for an injunction without a further inquiry into the merits of the case.¹

§ 814. **Effect of Decision in Interference Proceedings.** — A decision in the patent office, though not binding on the court, has more or less weight according to the subject-matter of the judgment, and the violence of the contest by which it was preceded.² But a presumption of validity arising from a successful interfer-

the injunction. If I have the right, in a court of equity, to examine the evidence in a cause which is tried before me at law, and to draw my own conclusions when I am asked to grant an injunction, and ought to refuse it if I am not satisfied with the verdict, then, though I might hesitate to set the verdict aside because I was not satisfied with the same, especially after the modern decisions on this subject, yet it would not follow that I ought to grant an injunction. The jury draw their own conclusions from the evidence, and it is their right so to do; and because I might not draw the same conclusions, this of itself is not sufficient to justify me in setting the verdict aside, if they have no evidence to judge from. If I should do so, I should substitute myself as judge of the facts, in a trial at law, which the parties and the law have submitted to the jury. But when I am applied to in equity, where I am a judge of the facts as well as law, and required to perform an act which calls upon me to draw my own conclusions from the evidence which I heard upon the trial, there my own judgment upon the law and the evidence must determine my action, and not the judgment of the jury. I will not set aside a verdict because I differed from the jury upon the evidence, because the verdict is theirs, and they act upon their consciences. But when I have to act upon my own conscience, then I cannot suffer the jury to control me in my province, for the same reason that I should deem it improper for me to control them in their province. There are cases where, though I might be dissatisfied with the verdict, yet not so much so but that I might think it proper to suffer the verdict to be the basis for an injunction."

¹ Rob. on Pat. § 1179 (citing numerous cases). *Discretion as to awarding a jury trial.* — The granting a jury trial to test the question of an alleged infringement on an application for a preliminary injunction is not a condition precedent to the relief; nor has the defendant in such action an absolute right to demand it. It rests in the discretion of the court whether it will award an issue to be tried by a jury or proceed to a determination of the legal rights and equities from the facts without issue. *Brookes v. Norcross*, 2 Fish. Pat. Cas. 661; *Potter v. Fuller*, Id. 251; *Motte v. Bennett*, Id. 642.

² Rob. on Pat. § 1183; *Celluloid Mfg. Co. v. Chrolithian Collar & Cuff Co.*, 24 Fed. Rep. 275; *Wilson v. Barnum*, 2 Fisher, 635; *Minneapolis Harvester Works v. McCormick Harvesting Mach. Co.*, 28 Fed. Rep. 565; *Consolidated Bunting Apparatus Co. v. Peter Schoenhofen Brewing Co.*, 28 Fed. Rep. 428; *Geis v. Kimber*, 36 Fed. Rep. 105.

ence in the patent office only applies against the parties to the interference and their privies. It does not extend to litigants who do not make the infringing article under a grant from the interference.¹ And yet as between rival claimants, a judgment in an interference, awarding priority to one of them, is sufficient ground for an injunction in his favor.² On the same principle a finding that a complainant's invention will accomplish practical results avails him in his efforts to enjoin the party who denies it.³ So an injunction will be granted against the defeated party to an interference in favor of the successful party, if the former relies on his own prior patent;⁴ and an extension of a patent against the granting of which there has been persistent opposition is evidence of its validity which only strong counter-proof can overcome.⁵

§ 815. **Same — Scope of Commissioner's Decision — Ex parte Hearing in Patent Office, etc.** — Where the only question raised by the interference is as to which is the prior inventor, this decision is not equivalent to an adjudication in favor of the patent, and will not justify a preliminary injunction in an action where the patent is assailed for want of novelty.⁶ And while the award of a patent without objection is of some authority, it alone does not

¹ *Edward Barr Co. v. N. Y. & N. H. A. S. Co.*, 32 F. 79.

² *Shuter v. Davis*, 16 Fed. Rep. 564; *Yuengling v. Johnson*, 1 Hughes, 607; *Edward Barr Co. v. N. Y. & N. H. Automatic Sprinkler Co.*, 32 Fed. Rep. 79; *Kirk v. Du Bois*, 42 O. G. 297; *Holliday v. Pickhardt*, 12 Fed. Rep. 147; *Smith v. Halkyard*, 16 Fed. Rep. 414; *Dickerson v. De la Vergne Refrigerating Mach. Co.*, 35 Fed. Rep. 143; *Peck Stow & Wilcox Co. v. Lindsay Sterritt Co.*, 2 Fed. Rep. 688; *Perry v. Starrett*, 14 O. G. 599; *Union Paper Bag Mach. Co. v. Crane, Holmes (U. S.)*, 429; *Greenwood v. Pracher*, 1 Fed. Rep. 856.

³ *Holliday v. Pickhardt*, 12 Fed. Rep. 147.

⁴ *Greenwood v. Pracher*, 1 Fed. Rep. 856.

⁵ *Gibson v. Gifford*, 1 Blatchf. 529. A decision that patentable differences exist between the patented invention and another art or instrument is a sufficient answer to the latter when urged against the novelty of the invention. *Rob. on Pat.* § 1183; *Putnam v. Weatherbee*, 8 O. G. 320.

⁶ *Dickerson v. De la Vergne Refrigerating Machine Co.*, 35 F. 143. *Where no evidence preserved.* — Where, on motion for a preliminary injunction to restrain infringement, it is necessary for the patentee to show that he made the invention some years before he applied for a patent, in order to meet the charge of anticipation, the finding of the examiner of interferences to the effect that the patentee did make the invention at the earlier date is not sufficient proof of the fact to warrant issuing the injunction when the evidence on which the examiner based his finding is not preserved. *Siemens-Lungren Co. v. Hatch*, (Cir. Ct.) 47 F. 64.

empower the court to interfere for the protection of its owner.¹ The provision of the statute giving an unsuccessful applicant for a patent the right to apply to a court of equity, and which provides that an adjudication by the court in the applicant's favor "shall authorize the commissioner to issue such patent" to the applicant, confers on the court no power to enjoin the commissioner from issuing letters patent in favor of one whom he has adjudged entitled thereto.²

§ 816. **Disputed Questions of Law and Fact.** — A preliminary injunction will not be granted where there is substantial doubt as to the novelty and originality of plaintiff's patent, or whether the defendant has been guilty of infringing it. Where the bill states a clear right to the thing patented, together with the alleged infringement, and is verified by affidavit, plaintiff having been in possession of it by having used or sold it, in part or in whole, the court will grant an injunction and continue it until the hearing or further order without sending the plaintiff to law to try his right. But if there appear to be reasonable doubt as to the plaintiff's right or to the validity of the patent, the court will require the plaintiff to establish his title at law, sometimes accompanied with an order to expedite the trial, and will permit him to return for an account in case the trial at law should be in his favor.³ But no injunction will issue on a theory unsupported by proof.⁴ A motion for a preliminary in-

¹ *Potter v. Stevens*, 2 Fisher, 163; *Jones v. Merrill*, 8 O. G. 401; *Arnheim v. Finster*, 24 Fed. Rep. 276; *Shuter v. Davis*, 16 Fed. Rep. 564; *Yuengling v. Johnson*, 1 Hughes, 607; *Edward Barr Co. v. N. Y. & N. H. Automatic Sprinkler Co.*, 32 Fed. Rep. 416.

² *Illingworth v. Atha*, 42 F. 141; Rev. St. U. S. 4915. See *United States v. Colgate*, 21 Fed. Rep. 318.

ALLEGATION OF FRAUD IN OBTAINING PATENT. — A complainant who alleges that defendant induced the commissioner of patents to decide in his favor, as to the priority of an invention, by means of false testimony and misleading statements, but who nowhere particularizes the falsehood or perjury, and who introduces practically the same evidence on the hearing of a motion to restrain defendant from receiving letters patent that had already been considered by the commissioner, is not entitled to a preliminary injunction. *Illingworth v. Atha*, 42 F. 141.

³ *Motte v. Bennett*, 2 Fish. 642; *Hammond Buckle Co. v. Goodyear Rubber Co.*, (Cir. Ct.) 49 F. 274; *Ogle v. Edge*, 4 Wash. (U. S.) 584. See also *Dodge v. Card*, 2 Fish. Pat. Cas. (U. S.) 166; *Sullivan v. Redfield*, 1 Paine (U. S.), 441; *Winans v. Eaton*, 1 Fish. Pat. Cas. (U. S.) 181. See also *Wise v. Grand Avenue R. R. Co.*, 33 Fed. Rep. 277.

⁴ *American Diamond Rock Boring Machine Co. v. Sullivan Mach. Co.*, 14 Blatch. 119.

junction is not designed to adjudicate disputed points not previously discussed;¹ nor is the court on such motion bound to decide difficult questions of law or disputed issues of fact, or to order an injunction until after a full hearing.² The court will at this stage only examine far enough to see whether the plaintiff's equitable rights require protection during litigation.³

§ 817. **Matters of Proof.** — To justify a preliminary injunction it is not required that the infringement should be proven beyond a reasonable doubt.⁴ But an injunction will be refused where the allegations of exclusive possession are avoided by averments and proof of a more peaceable and exclusive possession by defendants under patents purchased and used by them.⁵ In case of a simple mechanism a bare inspection of the two machines is often enough to show an infringement for the purposes of a preliminary injunction;⁶ and the refusal of a defendant to exhibit his device raises a presumption of infringement.⁷

¹ *Gold & Stock Telegraph Co. v. Commercial Telegraph Co.*, 22 Fed. Rep. 838.

² *Parker v. Sears*, 1 Fisher, 93.

³ *Sickels v. Younf*, 3 Blatch. 293.

⁴ *Doughty v. West*, 2 Fisher, 553. The author of a valuable treatise on the subject of patents has thus stated the essential elements of a case proper for relief by injunction. "A preliminary injunction will be granted only when the court is satisfied: 1. That the patent is valid; 2. That the plaintiff is the owner of a legal or equitable interest therein; and 3. That the defendant is about to commit an act of infringement. It will be denied if reasonable doubt exists upon any one of these points, and even when they are established if other circumstances render its allowance inexpedient or inequitable. Upon an application for a preliminary injunction, an exhaustive hearing as to these essential points is not, however, usually permitted. The court will not anticipate the trial on the merits by an extended examination of the testimony then to be produced, but in cases involving obscure propositions of law, or disputed and intricate questions of fact, will refuse the injunction until these matters come up for investigation in their proper order. This necessary attitude of the courts toward these applications has led to the adoption of peculiar rules of evidence, by which the plaintiff is required to furnish certain special forms of proof, or in their absence to await the final hearing before invoking this preventive power." *Rob. on Pat.* § 1173. See also *Shelley v. Brannan*, 4 Fisher, 198; *Goodyear v. Hills*, 3 Fisher, 134; *Potter v. Muller*, 2 Fisher, 465; *Goodyear v. Day*, 2 Wall. Jr. 283.

⁵ *Parker v. Sears*, 1 Fish. Pat. Cas. 93.

⁶ *Morse Fountain Pen Co. v. Esterbrook Steel Pen Manuf. Co.*, 3 Fisher, 515. See also *Crowell v. Harlow*, 3 Bann. & A. 478.

⁷ *Piper v. Brown*, 6 Fisher, 240; *Union Paper Bag Mach. Co. v. Binney*, 5 Fisher, 166. The question of infringement must be determined anew upon each motion for an injunction, though the validity of the patent be sustained by prior judgments. *Hammerschlag Manuf. Co. v. Judd*, 28 Fed. Rep. 621.

§ 818. **Same — Equitable Title.** — As the plaintiff's title, whether it be legal or equitable, is capable of direct proof, which may usually be made without extensive investigation, a higher degree of certainty in the evidence presented will be required than is necessary in establishing the validity of the patent. Where plaintiff owns the legal title as patentee or assignee or grantee, the instruments under which he claims, or certified copies, must be produced for the purpose of showing the exact condition of his ownership. When his interest is equitable merely, he will be required to produce the written contract upon which it rests, or to establish by parol evidence the facts and circumstances from which it arises.¹

§ 819. **Effect of Disclaimer by Defendant.** — Where the defendant does not deny the infringement, but alleges that he has ceased to infringe before bill filed, and does not intend to renew the use of the infringing machine, which still remains in his possession, the patent having been adjudicated to be valid, a preliminary injunction should be granted notwithstanding such disclaimer.² But a preliminary injunction will not be granted to restrain alleged infringements of a patent in which there is a disclaimer of what is covered by another application, where a copy of such other application is not produced, so that the court can ascertain the extent of the disclaimer.³

§ 820. **Presumption of Title from User and Public Recognition.** — The fact that plaintiff has been in undisturbed possession and exercise of rights under his patent for a considerable period may justify the court in granting a preliminary injunction in the first instance, even though his right is denied.⁴ The acquiescence of the public in the exclusive right it may reasonably be presumed would not exist unless the right was well founded.⁵ The reason for this rule, if it may be termed a rule, is that where there has been a long enjoyment under the patent the

¹ Rob. Pat. § 1190. See *Continental Store Service Co. v. N. Y. Store Service Co.*, 31 O. G. 1561.

² *Celluloid Manuf. Co.*, 34 F. 324.

³ *National Typographic Co. v. New York Typograph Co.*, 46 F. 114.

⁴ *Stevens v. Keating*, 2 Ph. 333; *Washburn v. Gould*, 3 Story (U. S.), 156, 169; *Orr v. Littlefield*, 1 Woodb. & M. (U. S.) 13; *Ogle v. Edge*, 4 Wash. (U. S.) 584; *Foster v. Moore*, 1 Curt. (U. S.) 279; *Blackford v. Skeurs*, Web. P. C. 211; *Goodyear v. Central R.*, 1 Fish. Pat. Cas. (U. S.) 626.

⁵ *Foster v. Moore*, 1 Curtis, (U. S.) 279.

public have had the opportunity of contesting the patent, and the fact of their not having done so, successfully, affords at least *prima facie* evidence that the title of the patentee is good; and the court therefore interferes before the right is established at law.¹ There is no established rule as to what length of user will be sufficient basis for a presumption of right in the complainant. In one case user and uncontested claim of title for eight years was held sufficient to authorize an injunction without a trial at law;² in another case it was held that a patent which had been issued less than a year was too recent to have acquired any settled construction by recognition.³ Mere lapse of time without open claim of right and continual user is not considered sufficient evidence of public acquiescence and recognition of plaintiff's right to warrant an injunction.⁴ But it was held sufficient proof of acquiescence to warrant a preliminary injunction against infringing a patent, to show that for about six years immediately following the issuance of the patent, plaintiff had manufactured the articles in large quantities, had constantly and publicly proclaimed his exclusive right to make them, had sold many thousands of them to dealers interested in contesting his right, none of whom had questioned it, and that defendant himself acquiesced in such right until a very recent period.⁵ On the other hand, proof showing that the plaintiff, while manufacturing under his own patent in his own shop, met with no competition, does not establish acquiescence.⁶

¹ *Caldwell v. Vanvliessen*, 9 Hare, 415. See also *Hill v. Thompson*, 3 Meriv. 622; *Potter v. Holland*, 1 Fish. Pat. Cas. (U. S.) 382. The subject of a patent being one of nine patented improvements embodied in the "Rochester lamp," the use of such lamps by the public, with acquiescence in the exclusive right of the owners of the patents, is not a recognition of the validity of the particular patent in controversy. *Upton v. Wayland*, 36 F. 691.

² *Potter v. Muller*, 2 Fish. Pat. Cas. 465.

³ *Johnston Ruffler Co. v. Avery Machine Co.*, 28 Fed. Rep. 193.

⁴ *Guidet v. Palmer*, 10 Blatchf. (U. S.) 217; s. c. 6 Fish. Pat. Cas. (U. S.) 82. See *Earth Closet Co. v. Fenner*, 5 Fish. Pat. Cas. (U. S.) 15.

⁵ *White v. Hunter*, (Cir. Ct.) 47 F. 819.

⁶ *Grover & Baker Sewing Mach. Co. v. Williams*, 2 Fisher, 133. The whole law on the question of what constitutes acquiescence to establish the validity of a complainant's patent both as regards the public and a particular defendant proceeded against by injunction is well summarized in *Robinson on Patents*, § 1185, where numerous authorities are cited and analyzed. See also to the effect that no injunction will be granted unless the patent has been sustained by a judgment or acquiesced in by long exclusive use or its equiv-

§ 821. **Doubtful Patentability of Machines or Devices.** — In the absence of a prior adjudication of the validity of a patent, and of proof of general acquiescence therein, the court will not grant an injunction *pendente lite* on a bill to restrain infringement where the proof leaves it uncertain as to the patentability of the patented article; and where it appears that respondents have large and valuable property, and are perfectly solvent, and the measure of complainant's damages in case his patent is finally established can be easily ascertained.¹ Thus, it was held that an invention which merely provided for a proper support for the upright rod of a transom lifter, to prevent its being bent by the weight of the transom, consisting of a guide or loop beyond the rod's junction with the lifting arm, and the extension of the rod to the loop, was of such doubtful patentability as to prevent the issuance of an injunction *pendente lite* against its infringement.²

§ 822. **Same — Novelty — Originality, etc.** — Where the answer denies the charge of infringement, and shows that the novelty of plaintiff's invention is doubtful, a preliminary injunction should not be granted.³ So where defendants admit the validity of the

alent. *Edward Barr Co. v. New Haven Automatic Sprinkler Co.*, 32 Fed. Rep. 79; *Foster v. Crossin*, 23 Fed. Rep. 400; *Kirby Bung Manuf. Co. v. White*, 1 Fed. Rep. 604; *Hockholzer v. Eager*, 2 Sawyer, 861; *Doughty v. West*, 2 Fisher, 553; *Orr v. Littlefield*, 1 W. & M. 13; *Ogle v. Edge*, 4 Wash. 584. A defendant admitted infringement, but set up want of patentable novelty. The affidavits submitted in support of want of novelty were made, some by licensees, some by affiants who had made contrary statements out of court, and some by persons who in former litigation had been sworn, but had not pointed out these instances of anticipation. Many manufacturers testified that they knew of no prior use. *Held*, that these facts raised a presumption that the patent was valid, and as the loss to the defendant from granting the injunction would be trifling as compared with that the complainant would suffer from its refusal, the writ should issue. *Hat-Sweat Manuf. Co. v. Davis Sewing-Machine Co.*, 32 F. 401.

¹ *Kane v. Huggins Cracker & Candy Co.*, 44 F. 287. See also *Judson L. Thompson Manuf. Co. v. Hatheway*, 41 F. 519.

² *Wollensak v. Sargent*, 33 F. 840

³ *Standard Paint Co. v. Reynolds*, 48 F. 304; *Upton v. Wayland*, 36 F. 691. See also *Canfield Rubber Co. v. Gross*, 32 F. 226.

LACK OF MECHANICAL SKILL. — Letters patent for a shade or globe holder for candles which should descend as the candle burned down, were applied for by complainant. A part of his claims were rejected as already covered by British patents; whereupon he obtained a patent on an amended claim in which the modification consisted of two upper rings, which he claimed rendered the hold of the shade upon the candle more secure. *Held*, that the improvement

patent, if construed as they construe it, but deny the infringement; say that, if the patent be construed as plaintiffs construe it, they admit the infringement, but deny the validity of the patent for want of novelty, the complainant is not entitled to an injunction until he shows a former adjudication in favor of his patent, or an equivalent.¹ Especially should a preliminary injunction be refused where, in addition to an answer putting in issue the novelty of the article, there has also been an adjudication in the same circuit against the validity of the patent, which adjudication, although abiding a new trial ordered by the supreme court by reason of certain errors therein, was not set aside by reason of any decision of that court concerning the validity of the patent.²

§ 823. **Acts enjoined as constituting Infringement.** — The question of what constitutes an infringement entitling the owner of a patent to an injunction is naturally a very broad one. Any act or acts which, being continued, will obviously result in depriving the patentee of the profitable use and enjoyment of his invention, or, if not restrain, will enable the person doing the acts to set up an adverse claim based upon user and public recognition, presents a proper case for preventive relief, provided the complainant's title is made satisfactorily clear. Thus, where infringing articles have been manufactured for sale, injunction will issue although none of the articles have been actually sold or used.³ And although the owner of a patent may not be able to enjoin a person from publishing statements denying the validity of his patent, or his title thereto, yet, if such person is insolvent, and he threatens all who deal in the goods of the former with suits for infringement, thereby intimidating his customers, injunction is the proper remedy.⁴ And an injunction may issue though the defendant is suing to obtain

did not exhibit sufficient mechanical skill or ingenuity to warrant the issuance of a preliminary injunction. *Leary v. Hohenstein*, 33 F. 832.

¹ *Dickerson v. De la Vergne Refrigerating Machine Co.*, 35 F. 148.

² *Keyes v. Pueblo S. & R. Co.*, 31 F. 560.

³ *Butz Thermo-Electric, etc. Co. v. Jacobs Electric Co.*, 36 F. 191. See *People v. Diedrich*, (Ill. Sup.) 30 N. E. 1038. Compare *Kelley v. Ypsilanti Dress-Stay Manuf. Co.*, 44 F. 19.

⁴ *Shoemaker v. South Spark-Arrester Co.*, (Ind. Sup.) 35 N. E. ; see also *Jonathan Mills Manuf'g Co. v. Whitehurst*, (C. C.) 56 F. 589; *Stanton Manuf'g Co. v. McFarland*, (N. J. Ch.) 27 A. 828.

a patent,¹ and even though the defendant has a subsequent patent, if the infringement be clear.² Nor will an injunction be refused on the ground that the defendant owns the infringing articles;³ or because the defendant holds a patent for an improvement, since this patent cannot avail him beyond its proper scope.⁴ But an injunction will not lie to restrain one who believes he is the owner of a certain patent, and that no other person has title thereto, from stating his claim as a mere belief.⁵ And where a patentee amends his application so as to exclude an improvement described in a rejected application cited by the patent office, and obtains a patent on such amended application, his assignee cannot enjoin, as an infringement, the use of the device described in the rejected application, even though the same was improperly cited.⁶

§ 824. **Rights anticipatory to procuring Patent.** — Where, however, an inventor of a machine sells it without a patent, but still retains an exclusive property in the patterns by which the machine is made, and one to whom such patterns are given to be repaired measures them, and reveals their dimensions to a third person, the latter may be enjoined from using patterns made from such measurements.⁷ A patent for a concrete street pavement formed by passing a corrugated roller over it before it became cold, so as to make indentations to catch the shod feet of horses, was held not an anticipation of complainant's patent for a composite pavement, formed with depressions in which the pressure of the foot produced a partial vacuum and prevented slipping; and it having been adjudicated in complainant's favor

¹ *Minneapolis Harvester Works v. McCormick Harvesting Mach. Co.*, 28 Fed. Rep. 565.

² *Morse Fountain Pen Co. v. Esterbrook Steel Pen Manuf. Co.*, 3 Fisher, 515.

³ *Porter Needle Co. v. National Needle Co.*, 17 Fed. Rep. 536.

⁴ *Goodyear Dental Vulcanite Co. v. Evans*, 3 Fisher, 390. Relief not refused on the ground that the plaintiff is violating some other patent. *Young v. Lippman*, 5 Fisher, 230.

⁵ *Everett Piano Co. v. Bent*, 60 Ill. App. 372; *New York Filter Co. v. Schwarzwald*, (C. C.) 58 F. 577.

⁶ *Lapham Dodge Co. v. Severin*, 40 F. 762.

⁷ *Tabor v. Hoffman*, 118 N. Y. 30; 23 N. E. 12. A preliminary injunction should be granted in a suit to restrain the infringement of a patent, where, in other suits for the infringement of the same patent, the patent has been adjudged valid, and devices identical in every material respect with that of defendant have been held infringements. *Putnam v. Keystone Bottle Stopper Co.*, 38 F. 234.

in a former case, a preliminary injunction was granted, the affidavits and specimens exhibited showing that defendant's patent was an infringement.¹ But ordinarily a defendant will not be enjoined from using an invention which he had in use when the patent was granted.² Where an inventor and others have manufactured and sold articles prior to the grant of design letters-patent therefor, and the only proof of infringement since the grant of the patents relates to a single sale made shortly after the grant of the patents, but prior to the establishment of their validity, and prior to notice of the patents, the articles not being marked patented, a preliminary injunction should be denied.³ Nor will a vendee be enjoined from using the article purchased, on the ground that it infringes another patent of the vendor, if it could be used in no other way.⁴

§ 825. **Same — Threatened Infringement.** — To entitle a patentee to preventive relief it is not required that acts injurious to his interest in the invention shall have already occurred or be in progress at the time of his application. An injunction will be granted before a wrong is committed when the right is clear and the wrong is threatened, or when the wrong has once been committed and there is good reason to fear its repetition.⁵ Thus, where a telephone company acquired certain patents which were shown to be infringements upon the Bell patent, and put up in their office sample instruments of an infringing character, and, by advertisements, invited the public to purchase their instruments, and become licensees of their patents and claims, although no instruments were actually ever made or used except experimentally, and none were ever sold, it was held that the acts of the company were sufficient to warrant a decree restrain-

¹ *Stuart v. Thorman*, 37 F. 90. A patent for improvements in electric gas-lighting apparatus, consisting of mechanism whereby the gas-cock is turned by one electric impulse, is not so manifestly infringed by a device by which the cock is turned by a series of impulses as to warrant the issue of a preliminary injunction. *Boston Electric Co. v. Holtzer*, 41 F. 390.

² *Dorlan v. Guie*, 25 Fed. Rep. 816. See *Russell v. Hyde*, 39 F. 614; *Cel-luloid Manuf. Co. v. Eastman Dry Plate & Film Co.*, 42 F. 159.

³ *Anderson v. Germain*, (Cir. Ct.) 48 F. 295.

⁴ *Roosevelt v. Western Electric Co.*, 20 Fed. Rep. 724.

⁵ *Sherman v. Nutt*, 35 Fed. Rep. 149; *Poppenhusen v. New York Gutta Percha Comb Co.*, 2 Fisher, 74. An injunction will be granted where there have been no actual sales but only prospective ones. *White v. Heath*, 10 Fed. Rep. 291.

ing infringement.¹ To authorize an injunction, however, the complainant must make it clearly to appear that the defendant intends to make, use, or sell, or authorize, or directly profit by the manufacture, use, or sale of some art or instrument identical with that covered by his patent.²

§ 826. **Protection against Wrongs not amounting to Infringement.** — Since there is no statute in this country giving an injunction, the remedy by action at law for damages, or a prosecution for libel, would probably be the proper proceeding for mere publications denying or questioning the validity of a patent.³ And it was held that a complainant in a suit for infringement of a patent would not be enjoined, on defendant's motion, from sending circulars to defendant's customers threatening suits against sellers of the infringing article, it being claimed that such threats were made in good faith, and it not being clear that such suits could not be successfully maintained.⁴ In England, under a statute⁵ an injunction lies to restrain one claiming as patentee from issuing threats of legal proceedings.⁶ In such action the validity of the patent cannot be tried.⁷

¹ American Bell Telephone Co. v. Globe Telephone Co., 31 F. 729.

² Brooks v. Miller, 28 Fed. Rep. 615; Burleigh Rock Drill Co. v. Lobdell, 1 Bann. & A. 625; Coburn v. Clark, 15 Fed. Rep. 804; Pullman v. Balt. & Ohio R. R. Co., 5 Fed. Rep. 72; Allis v. Stowell, 15 Fed. Rep. 242; Steam Gauge & Lantern Co. v. St. Louis Railway Supplies Manuf. Co., 25 Fed. Rep. 491; Marks v. Corn, 11 Fed. Rep. 900; Dodge v. Card, 2 Fisher, 116; White v. Harris & Sons Manuf. Co., 3 Fed. Rep. 161.

³ A. B. Farquar Co. v. National Harrow Co., 99 F. 160.

⁴ Welsbach Light Co. v. American Incandescent Lamp Co., 99 F. 501.

⁵ Patents, Designs, and Trademarks Act, 1883, § 32.

⁶ Driffeld Linseed Cake Co. v. Waterloo Mills Co., L. R. 31 Ch. Div. 638; Kurtz v. Spence, L. R. 33 Ch. Div. 579; Household v. Fairburn, 51 L. T. 498. *Motives of defendant.* — In Household v. Fairburn it appeared that the plaintiffs were makers of "Rainbow Water Raisers or Elevators," and they commenced an action for an injunction to restrain the defendants from issuing a circular cautioning the public against the use of such elevators as being direct infringements of certain patents of the defendants. The plaintiffs subsequently gave notice of a motion to restrain this circular until the trial of the action. The defendants then commenced a cross action claiming an injunction to restrain the plaintiffs from infringing their patents. *Held*, that as there was no evidence of *mala fides* on the part of the defendants, they ought not to be restrained from issuing the circular until their action had been disposed of, but that they must undertake to prosecute their action without delay. Kay, J., said: "It seems to me clearly settled law that, if a

⁷ Kurtz v. Spence, L. R. 33 Ch. Div. 579.

§ 827. **Violation of License Privilege.** — A bill in equity which sets forth a license to defendants to use certain patents embodied in machines leased to them by plaintiff, the license providing for the payment of license fees, or purchase and use of license stamps, and for rendering accounts, and which alleges failure of defendants in their obligations under the license, and prays for discovery and account, and decree for payment of fees, and an injunction until such payment, shows a cause for equitable relief.¹ But an injunction will be refused if the plaintiff has violated his contract with the defendant, although the defendant has also broken the contract.²

§ 828. **Infringement by Sale of Articles manufactured in Foreign Country.** — Important questions sometimes arise upon claims of priority based upon patents obtained in foreign countries when articles, the sale of which is alleged to infringe, have been manufactured and thence imported. Where the question whether or not complainant can treat defendants as infringers of his patent depends on whether the latter purchased goods covered by the patent from a foreign corporation operating under the same patent as complainant, with notice of a restriction against its resale in the United States, they having paid the purchase price, and the evidence on this question being insufficient, no interlocutory injunction against the resale of the goods in the United States will issue.³ So where complainants had pur-

man in defence of his own right, and particularly if that right is secured to him by letters patent, issues circulars to merchants and others who he supposes are infringing his patent, and who he *bona fide* believes are infringing his patent, and then supposing him to be challenged to put the patent in course of trial, and he accepts the challenge, the court will not interfere with the issuing of the circulars." A tradesman believing that he has a patent upon an article does not render him liable to an action by the vendor for damages for injury caused by issuing notices of the same, though he may be liable, notwithstanding his *bona fides*, to be restrained by injunction from continuing to issue the notices, if it is proved in the action for an injunction that his allegation in the notices of infringement is untrue. *Halsey v. Brotherhood*, L. R. 15 Ch. Div. 514.

¹ *McKay v. Smith*, 29 F. 295.

² *Crowell v. Parmenter*, 3 Bann. & A. 480. Compare *Willis v. McCollin*, 29 Fed. Rep. 641.

³ *Dickerson v. Matheson*, (Cir. Ct.) 47 F. 319. *Foreign adjudications.* — An injunction granted upon rendering an interlocutory decree for complainant, in a suit for infringement of a patent, was dissolved upon its being shown that there was a prior foreign patent for the same invention whose term had expired, and thereby terminated the life of the domestic patent, but such order of dis-

chased an invention upon which a British patent had been obtained, but which had expired before the purchase by reason of the failure to pay the fee to keep it alive, and they then obtained American patents, and sought to enjoin defendants from infringing, it was held that there was too much doubt of the validity of the American patents to warrant a temporary injunction.¹ In an English case it was held that the license to use a patent in Belgium did not imply permission to sell the manufactured article in England in violation of the complainant's English patent.²

§ 829. **Cessation of Infringement pending Suit.** — Although the party proceeded against as an infringer of the exclusive right of the person having the title to the patent admits the infringement, but asserts that after notice of service of the injunction he had refrained from the use of the thing patented, and asserts that he will not afterwards infringe, yet this is no reason why an injunction should not issue and be made perpetual. The complainant in such a case is not obliged to rest his interests on the mere asseveration of the party that he will not repeat the act of infringement. Having once been a wrong-doer, the law supposes the possibility of his being so again, and will impose the proper restraint to prevent the repetition of the wrongful act.³ And where an injunction has been denied on the ground that the defendant before suit abandoned the infringement, and he since makes a different infringing device, a new injunction will be granted covering all the devices.⁴

§ 830. **Proof of Infringement.** — In general, it may be stated

solution was afterwards vacated by the court by reason of the fact that a court of the foreign country had, since the making of such order, declared the foreign patent void *ab initio*. Such decree of the foreign court, declaring the foreign patent void, having afterwards been vacated by the same court on the ground that it was obtained by collusion, *held*, that the order dissolving the injunction should now be reinstated. *Bate Refrigerating Co. v. Gillett*, 31 F. 809.

¹ *Huber v. Myers Sanitary Depot*, 33 F. 48.

² *Betts v. Wilmot*, Law Rep. 9 Ch. 239; *Société Anonyme des Manufactures de Glaces v. Tilghman's Patent Sand Blast Co.*, L. R. 25 Ch. Div. 1.

³ *Jenkins v. Greenwald*, 2 Fisher, 87; *Facer v. Midvale Steel-Work Co.*, 38 Fed. Rep. 231; *North American Iron-works v. Fiske*, 30 Fed. Rep. 622; *Celluloid Manuf. Co. v. Arlington Manuf. Co.*, 34 Fed. Rep. 324; *Wollensak v. Reiher*, 28 Fed. Rep. 427; *Goodyear v. Berry*, 3 Fisher, 439; *Sickels v. Mitchell*, 3 Blatch. 548.

⁴ *Odell v. Stout*, 22 Fed. Rep. 159.

that to entitle complainant to a preliminary injunction he must accompany his application with affidavits or evidence in some other form, according to the practice of the court, from which the fact of infringement is made clearly to appear; and where the evidence is so conflicting as to require full proofs to determine the question of infringement, a preliminary injunction will not be granted,¹ especially when preliminary injunctions in other cases for the infringement of the same patent have been denied.² And where after examining the evidence in connection with the allegations there is a substantial doubt in regard to any infringement by defendants, a preliminary injunction will not be granted.³

§ 831. **Irreparable Injury — Compensation in Damages — Defendants' Solvency.** — It is not a matter of course, upon the presentation of a patent which *prima facie* established the right to the thing patented, accompanied by an allegation that the defendant is violating it, that a preliminary injunction will issue; but it must appear likewise that if the writ of injunction does not now issue the complainants will be irreparably injured, and that no subsequent decree of the court can sufficiently ascertain and make good their damages.⁴ While it is seldom a decisive question, on a motion for an injunction, whether the defendant is responsible for profits and damages if any are recovered,⁵ yet when the defendants are fully responsible, and the plaintiff can be adequately compensated, irreparable damages must be shown to warrant an injunction.⁶ These principles have no application upon the final hearing, if then the complainant's title and the infringement be clearly established. He will then be entitled

¹ American Fire Hose Manuf. Co. v. Cornelius Callahan Co., 41 F. 50. See also Thompson Manuf. Co. v. Hatheway, 41 F. 519; Russell v. Hyde, 39 F. 614. A preliminary injunction should not issue in a suit for infringement, where upon the issue of priority of invention the evidence is merely oath against oath. Mack v. Spencer, 44 F. 346.

² Thompson v. Rand-Avery Supply Co., 38 F. 112.

³ Morss v. Knapp, 39 F. 608.

⁴ Pullman Car Co. v. Baltimore & Ohio R. R. Co., 5 Fed. Rep. 72. See also Westinghouse Air Brake Co. v. Carpenter, 32 Fed. Rep. 484; Earth Closet Co. v. Fenner, 5 Fisher, 15; Zinsser v. Cooledge, 17 Fed. Rep. 538; Keyes v. Pueblo Smelting & Refining Co., 31 Fed. Rep. 560.

⁵ Morris v. Lowell Manuf. Co., 3 Fisher, 67.

⁶ New York Grape Sugar Co. v. American Grape Sugar Co., 10 Fed. Rep. 835; Pullman Car Co. v. Balt. & Ohio R. R. Co., 5 Fed. Rep. 72.

to an injunction unless, upon some peculiar equitable grounds, a bond and an accounting are required in lieu of injunction.¹

§ 832. **Diligence in seeking Relief—Laches.**—The general principle of equity jurisprudence which underlies applications of this sort, is that the court will not lend its help by way of preliminary injunction in those cases where it appears that the complainant has acquiesced in the infringement and unreasonably delayed suit against the infringers. When patentees sleep upon their rights, without an excuse, they must not rely upon the extraordinary aid of the court when they awake from their slumbers, but must be satisfied with such relief as may be afforded by the ordinary course of practice after final hearing.² Thus, injunction was refused where complainant had waited nine years without bringing suit against one who had been using the invention for that period, the defendant being abundantly able to compensate the plaintiff for any damage which he might show that he had sustained.³ And an assignee of a patent is chargeable with the laches of his assignor in bringing suit for infringement.⁴ But a delay in bringing actions against infringers, when satisfactorily accounted for, is not to be treated as laches.⁵ Accordingly, a plaintiff may delay suing other

¹ *Infra*, § 844.

² *Green v. French*, 4 Bann. & A. 169, per Nixon, J. See also *Jones v. Merrill*, 8 O. G. 401; *Wyeth v. Stone*, 1 Story, 273; *Keyes v. Pueblo Smelting & Refining Co.*, 31 Fed. Rep. 560; *Union Mfg. Co. v. Lounsbury*, 2 Fisher, 389; *McLaughlin v. People's R. R. Co.*, 21 Fed. Rep. 574; *Bridson v. Benneke*, 12 Beav. 1.

³ *Keyes v. Pueblo Smelting & Refining Co.*, 31 F. 560. In *United Nickel Co. v. New Home Sewing Mach. Co.*, 17 Fed. Rep. 528, complainant held barred by three years' delay, and a bill alleging thirteen years of infringement is demurrable unless it gives satisfactory reasons for the delay in suing. *McLaughlin v. People's R. R. Co.*, 21 Fed. Rep. 574.

⁴ *N. Y. Grape Sugar Co. v. Buffalo Grape Sugar Co.*, 24 Fed. Rep. 604; *Spring v. Domestic Sewing Mach. Co.*, 4 Bann. & A. 427. A known infringer should be early notified of the plaintiff's rights and of his intention to enforce them. *Morris v. Lowell Mfg. Co.*, 3 Fisher, 67. But if the plaintiff gave such notice as he was able, it is sufficient. *Kittle v. Hall*, 29 Fed. Rep. 508.

⁵ *Green v. French*, 4 Bann. & A. 169. In *Bridson v. Benneke*, 12 Beav. 1, Langdale, master of the rolls, said: "I think that a party coming for the assistance of this court to protect a legal right, not absolutely established, against the party who is alleged to have infringed it, ought to come at an early period. I do not say at the earliest possible period, because that would be putting an application for an injunction on notice, where all parties have an opportunity for being heard, in the same condition as an injunction *ex parte*, which it

infringers, while the validity of his patent is in question in a pending suit, without being guilty of laches.¹ And an injunction will be granted, though not prayed until the patent is about to expire, if the plaintiff has delayed only in order to establish his patent in the courts and has just succeeded.² Nor does the defendant's infringement while complainant is powerless to prevent it take away the latter's right to an injunction,³ nor is a patentee guilty of laches while ignorant of the infringement.⁴

§ 833. **Time of granting and Form of Relief affected by Laches.** — Complainant's delay in applying for an injunction seldom has a greater effect upon his interest in the proceeding than to postpone the granting of preventive relief until the final hearing, though in some cases such delay when unaccounted for may deprive him of the benefit of a decree for an accounting. Thus, where it was shown by the defendant that he had used the patented apparatus for nearly three years before any claim was made by the plaintiff, it was held that the injunction must be withheld, until the plaintiff established satisfactorily the point of acquiescence by the public, and explained how it was that he allowed the defendant's machine to be used so long without interference.⁵ In another case it was held that an unexplained delay of seven and a half years in bringing suit for infringement of a patent should deprive complainants of the right to a preliminary injunction, and perhaps to an account; but, inasmuch as it would be inequitable to allow infringement to continue in the future, a court of equity would entertain jurisdiction to grant an injunction notwithstanding such laches.⁶

§ 834. **Assignment by Complainant pendente lite.** — Where the owner of a patent makes an assignment pending a suit by him to restrain an infringement, and for damages, but expressly reserves past damages, and there is no proof or claim of infringement subsequent thereto, the assignee cannot maintain a suit

would not be expedient to do. The rule of this court is very strict, that you must apply in proper time."

¹ *Green v. Barney*, 19 Fed. Rep. 420; *Van Hook v. Pendleton*, 1 Blatch. 187.

² *Rumford Chemical Works v. Vice*, 14 Blatch. 179.

³ *McMillan v. Barclay*, 5 Fisher, 189.

⁴ *Kilbourn v. Sunderland*, 130 U. S. 505; *N. Y. Grape Sugar Co. v. Buffalo Grape Sugar Co.*, 18 Fed. Rep. 638; *Adams v. Howard*, 19 Fed. Rep. 317.

⁵ *Sykes v. Manhattan, etc. Drying Co.*, 6 Blatch. 496.

⁶ *Price v. Joliet Steel Co.*, 46 F. 107.

against the defendant, and should not therefore be joined as complainant.¹ Nor will injunction restraining infringement of a patent be granted against a corporation which has disposed of the business in which the patented device was used before the bill was filed, and has not since used it.²

§ 835. **Abandonment — Withdrawal from State.** — No injunction will issue if the plaintiff has abandoned the invention, or abandoned his rights under the patent.³ But delay in bringing suit is not abandonment;⁴ nor can the plaintiff be prejudiced by any acquiescence in the infringement not calculated to induce the reasonable belief that he intends to dedicate the invention to public use.⁵ And a patentee who has put his device into extensive use, and is receiving an income therefrom, may have an injunction against its infringement, though he has withdrawn it from a particular state because of legislative interference limiting the rate of charges.⁶

§ 836. **Acquiescence in Defendant's Infringement.** — Independent of the questions of abandonment and simple laches in bringing an action for infringement, a complainant may be estopped against either a particular defendant or all persons by reason either of his general conduct with reference to the property interest in the invention or on account of specific acts of acquiescence imputable to him.⁷ Mere forbearance to sue, after

¹ *New York Belting & Packing Co. v. New Jersey Car-Spring & Rubber Co.*, (Cir. Ct.) 47 F. 504.

² *Kane v. Huggins Cracker & Candy Co.*, 44 F. 287, holding also that an injunction will not be granted against the president of such corporation, who has been retained as an employee by the purchaser of the business of the corporation.

³ *Wyeth v. Stone*, 1 Story, 273.

⁴ *Williams v. Boston & Albany R. R. Co.*, 17 Blatch. 21.

⁵ *Ibid.*

⁶ *American Bell Tel. Co. v. Cushman Tel. & Service Co.*, 36 F. 488.

⁷ *Kittle v. Hall*, 29 Fed. Rep. 508; *Union Mfg. Co. v. Lounsbury*, 2 Fisher, 389; *Magic Ruffle Co. v. Elm City Co.*, 14 Blatch. 109. Laches in obtaining a reissue may prevent relief in equity. *Wollensak v. Reiher*, 115 U. S. 96; *Tillinghast v. Hicks*, 13 Fed. Rep. 388. In *McLaughlin v. People's R. R. Co.*, 21 Fed. Rep. 574, Brewer, J., said: "Now, generally speaking, the laches of complainant is sufficient ground for non-interference on the part of a court of equity. Nearly all the lifetime of this patent the complainant has remained silent, by his silence consenting to, or at least acquiescing in, the acts of the defendant. To interfere now by injunction would seem manifestly inequitable. That this question of laches can be raised by demurrer, and that it is a good defence to a bill in equity, is abundantly sustained by the authorities."

notice given, cannot affect the right to an injunction, unless such affirmative encouragement to the infringer was also given, as to work an estoppel.¹ But where the owner of a patent for an invention used in car-couplings is not merely a user of the patent, but licenses its use by others, a railroad company will not be temporarily enjoined, in a suit for infringement and damages, from using such infringing couplings as it already has in use, where the parties are wide apart in their views as to the proper amount of royalty, but may be enjoined from the use of any others which may infringe.²

§ 837. **Expiration of Patent pending Suit.** — Where the patent was in force at the time the bill was filed, and the complainants were entitled to a preliminary injunction at that time, the jurisdiction of the court is not defeated by the expiration of the patent by lapse of time before final decree.³ And the weight of authority is to the effect that an injunction should issue after the patent has expired, when necessary to prevent the use or sale of articles made without authority for that purpose while the patent was in force.⁴ But the sale of an article made under

¹ *Collignon v. Hayes*, 8 Fed. Rep. 912. See also *N. Y. Grape Sugar Co. v. Buffalo Grape Sugar Co.*, 18 Fed. Rep. 638; *Reay v. Raynor*, 19 Fed. Rep. 308.

LITIGATION PENDING AGAINST OTHER INFRINGERS. — Defendants resisted an application for a preliminary injunction on the ground that complainants were guilty of laches. Defendants engaged in their enterprise in the summer of 1885, and this suit was brought in the fall of 1887. For two years before suit defendants had been in operation, and had built up a business of four hundred telephones. The fact that they were establishing the business was well known to complainants, who took no steps to restrain them. But, before and at the time defendants began their business, complainants and their patentee were carrying on litigation in several courts of the United States, and in many ways were vigorously asserting and enforcing their claims, and a case involving the validity of that patent was then pending in the supreme court, all which facts were well and publicly known. It was held that these facts were not sufficient to warrant a conclusion that complainants had been guilty of such laches as would bar them from obtaining the relief sought. *American Bell Tel. Co. v. Southern Tel. Co.*, 34 F. 795.

² *Campbell Printing Press & Manuf. Co. v. Manhattan Ry. Co.*, (Cir. Ct.) 47 F. 663; see also *Waite v. Chichester Chair Co.*, 45 F. 258; *Amazeen Machine Co. v. Knight*, 39 F. 612.

³ *Bradley, Field, and Gray, JJ.*, dissenting. *Beedle v. Bennett*, 7 S. Ct. 1090.

⁴ *New York Belting & Packing Co. v. Magowan*, 27 Fed. Rep. 111; *American Diamond Rock Boring Co. v. Sheldon*, 1 Fed. Rep. 870. Compare *Lord v. Whitehead, etc. Co.*, 24 Fed. Rep. 801; *Keyes v. Eureka Con. Manuf'g Co.*,

the patent with the consent of the patentee cannot be enjoined after the patent expires.¹ And after a patent, the infringement of which has been enjoined, expires, the injunction will usually be dissolved without reference to such articles as were manufactured while the patent was alive. The patentee may recover damages for such acts of infringement.²

§ 838. **Essential Allegations.** — The allegations of a complaint for infringement where injunction is sought must set forth the complainant's title, the facts constituting the infringement, and such other matters as show an equitable claim for relief.³ With reference to complainant's title, an allegation that complainant has a patent, describing it in a general way, coupled with profert of the patent, is sufficient. The profert is equivalent to an averment that he has title to all the rights specifically described in such patent.⁴ And where no preliminary injunction is asked

45 F. 199. The last years or months of a patent are often the most valuable, and the patentee is entitled to the benefit thereof. *Westinghouse Air-Brake Co. v. Carpenter*, 32 F. 484. It is no ground for a demurrer to a bill for infringement of a patent, that the patent, at the time of filing the bill, had only twenty-one days to run, when by the rules of courts an injunction, if applied for, could have been granted within four days, and would thus have had seventeen days to run. *Kittle v. De Graaf*, 30 F. 689; *Same v. Schneider*, Id. 690.

SALE OF INTEREST PENDING SUIT. — In a suit to restrain the infringement of a patent, the respondent sold out his interest in the business which was alleged to infringe, pending the hearing. The suit proceeded, without any change of parties, and a decree was entered against him, and in favor of the patent. *Held*, although the decree may have been entered in pursuance of an agreement between his vendee and the complainant without his personal co-operation, still, by giving up to his vendee the control and management of the suit, the respondent must be taken to have authorized such an agreement, and the decree in favor of the validity of the patent is *res adjudicata* as between him and the complainant. *Gloucester Isinglass & Glue Co. v. Le Page*, 30 F. 370.

¹ *Reay v. Rau*, 15 Fed. Rep. 749.

² *Westinghouse v. Carpenter*, 43 F. 894. The time of such expiration being a point already in litigation, the question would more properly be brought up on motion to dissolve when such time should arrive. *Id.* The only ground of equitable jurisdiction for infringement of a patent being relief by injunction, where the patent expired before defendant was required to answer, no injunction could be granted on final decree, and the only remaining cause of action being for royalties under an implied license, the remedy is purely legal, and, in the absence of a proper showing as to citizenship, there is no element of national jurisdiction, and the suit must be dismissed. *Keyes v. Eureka Con. Manuf. Co.*, 45 F. 199.

³ As to what must be established at the hearing and hence substantially alleged in the complaint, see *supra*.

⁴ *American Bell Tel. Co. v. Southern Tel. Co.*, 34 F. 803, holding also that

for, a bill to enjoin the infringement of a patent need not show that the complainant is engaged in making or selling the articles described in his patent, that such patent has been a source of profit to him, or that the validity of the patent has been established by prior adjudication or by public acquiescence.¹ But a bill to enjoin an infringement of a patent described therein merely as an "improvement in cable railways," the patent and specifications not being annexed as exhibits, is demurrable, as not showing with sufficient certainty in what the alleged invention consists.²

§ 839. **Wide Latitude of Discretion in Patent Cases.** — Owing to the magnitude of the interests which are frequently involved, also to the frequent necessity of distinguishing between technical right whether substantial or remedial and equitable considerations, also to the great difficulty or impossibility, in some cases, of making an exact adjustment of all the conflicting claims, courts are wont to assume and are accorded a wide latitude of discretion in disposing of patent cases.³ Undoubt-

an averment, in a bill for injunction, that complainant's patent has been adjudicated by another circuit court, and held valid, being in accordance with the rule that a party seeking relief by injunction must first establish his title at law, is proper.

¹ *Wirt v. Hicks*, 46 F. 71.

² *Wise v. Grand Ave. Ry. Co.*, 88 Fed. 277. A bill for an injunction alleged that complainants were the owners of certain patents on coal-mining machines, and entitled to the exclusive right of sale thereof; that defendants were using machines which were of the same pattern as complainants' machine without a license from complainants; and that such use was an infringement of complainants' patent. *Held*, that complainants were not entitled to a preliminary injunction, where it was shown that defendants were solvent. *Whitcomb v. Girard Coal Co.*, (Cir. Ct.) 47 F. 315; see also *R. E. Dietz Co. v. C. T. Ham Manuf. Co.*, (Cir. Ct.) 47 F. 320.

³ In *Earth Closet Co. v. Fenner*, 5 Fisher, 15, the court said, with perhaps more rhetorical finish than accuracy: "The law makes the judge's discretion the rule, not unheeded that, in the qualities of mind which give character to an exercise of discretion, individuals differ scarcely less than in form and features. The judge is bound to decide a question of this kind as, in his judgment upon the particular case before him, the principles of equity and the practice of its court warrant or dictate, — and this, whether his decision be in accord or at variance with that of his brother officer, of whatever grade or whatever locality. The largest liberty imaginable is his, 'with no rules to restrain, no after reckoning to dread.' Neither upon appeal, nor by writ of error; nor even by petition for revisory action, can a judge's rulings or findings upon a motion for a preliminary injunction be subjected to correction or even criticism on the part of his superiors in official rank or in judicial acumen."

edly the United States courts have, under the statute, a larger discretion in patent cases than in others,¹ and it is also true that the issue or refusal of a preliminary injunction is always within the discretion of the court, and from its judgment there is no appeal.² But the principles which govern courts in granting or refusing preliminary injunctions in patent cases are well established. As a general rule, if the plaintiff has made out a clear title and the question of infringement presents no difficulty, an injunction will be granted. The hearing is had upon *ex parte* affidavits, and if the questions to be decided are difficult and complicated, especially if they involve disputed facts which have never been passed upon by a court or jury, then, although the court may be inclined to think the complainant is right, yet it will not interfere at this stage of the cause whether the questions relate to title or to infringement. And even when the title is clear, yet if there are peculiar circumstances which show that the defendant's interests would be very injuriously affected by an injunction, while those of the plaintiff would not be so affected by refusing it, it may be refused.³

§ 840. **Relative Convenience and Inconvenience to Parties.** — This large discretionary power is exercised not only in deciding whether to grant or withhold an injunction, but also as to the terms upon which it will grant it after deciding that the complainant is entitled to that form of relief. The state of the litigation, where the plaintiff's title is denied, the nature of the improvement, the character and extent of the infringement complained of, and the comparative inconvenience which will be

¹ See *Yuengling v. Johnson*, 1 Hughes, 607.

² *Irwin v. Dane*, 4 Fisher, 859; *Potter v. Whitney*, 3 Fisher, 77; *Ayling v. Hull*, 2 Clifford, 494.

³ *Potter v. Whitney*, 3 Fisher, 77, per Lowell, J. See also *Smith v. Cummings*, 4 Fisher, 152; *Norton Door Check & Spring Co. v. Hall*, 37 Fed. Rep. 691; *Goodyear v. Railroad*, 1 Fisher, 626; *Wilson Packing Co. v. Clapp*, 8 Bissell, 154; *Illingworth v. Spaulding*, 9 Fed. Rep. 154; *Bradley & Hubbard Mfg. Co. v. Charles Parker Co.*, 17 Fed. Rep. 240; *Cross v. Livermore*, 9 Fed. Rep. 607; *Huber v. Myers Sanitary Depot*, 34 Fed. Rep. 48; *Fales v. Wentworth*, 5 Fisher, 302; *Winans v. Eaton*, 1 Fisher, 181; *Brooks v. Picknell*, 4 McLean, 70. In *Motte v. Bennett*, 2 Fisher, 642, Wayne, J., said: "By discretion, of course, is meant an obligation upon judges in chancery to determine each case, as nearly as it can be done, by what has been the course in chancery in like cases, as well as to prescribe the practice to be observed in each case, and the principles by which the right is to be determined between the parties in controversy. It never means will or authority in the judge, but both restrained by decided cases or long-standing rules." See *Rob. on Pat.* § 1171.

occasioned to the respective parties by allowing or denying the motion, must all be considered in determining whether it should be allowed or refused, and if at all, whether absolutely, or upon some and what conditions.¹ A correct general rule was thus stated: "In granting or refusing a preliminary injunction, the court will carefully consider the situation of the parties. Its important office is to preserve the rights of the patentee pending the litigation of his title. If the title has already been fully established, or is otherwise so clear that no reasonable doubt of its validity remains, a court of equity would, in many cases, grant such an injunction as it would a final injunction, notwithstanding the injury which might result to the defendant. But where there is no danger of loss to the plaintiff, and great loss will result to the defendant, the case must be substantially free from doubt to require such action."² It should be borne in mind that it is only in cases of doubt either as to complainant's title, or as to the fact of infringement, or where acquiescence by which the defendant has been misled that the court may properly consider the question of relative injury and inconvenience; and an injunction will issue though the injury to the defendant may be great, if the right of the plaintiff and the fact of infringement are clear.³

§ 841. **Same Subject.** — If the plaintiff's right is clear, an injunction works no real hardship to the defendant.⁴ But no injunction will be granted where new and difficult questions are to be decided, or where there is anything in the relations of the parties which could cause it to operate unjustly.⁵ So where the plaintiff can be otherwise protected, a defendant who has acted in good faith, and who would be seriously injured by an injunction, will not be enjoined.⁶ Thus, the relief was refused

¹ *Furbish v. Bradford*, 1 Fish. Pat. Cas. 315. See also *Brooks v. Norcross*, 2 Fish. Pat. Cas. 251.

² *Morris v. Lowell Mfg. Co.*, 3 Fisher, 67, per Lowell, J. See also *Grafton v. Watson*, 51 L. T. 141; *Isaacs v. Cooper*, 4 Wash. 259; *Root v. Mt. Adams & Eden Park Inclined Ry. Co.*, 40 F. 760; *Ely v. Monson & Brimfield Mfg. Co.*, 4 Fisher, 64; *Hockholzer v. Eager*, 2 Sawyer, 361.

³ *Hodge v. Hudson River R. R. Co.*, 6 Blatch. 165.

⁴ *Potter v. Schenck*, 3 Fisher, 82. If the defendant erects works to carry on the business after notice that he infringes, he has no claim to consideration in equity. *Westinghouse Air-Brake Co. v. Carpenter*, 32 Fed. Rep. 545.

⁵ *Union Paper Bag Mach. Co. v. Binney*, 5 Fisher, 166.

⁶ *Batten v. Silliman*, 3 Wall. Jr. 124; *Swift v. Jenks*, 19 Fed. Rep. 641;

where the plaintiff and defendant were rival manufacturers and the patent covered only part of a larger machine which could not be dispensed with except at great loss, royalty being tendered;¹ and on a motion for an injunction it is a material question whether the defendant makes and sells or only uses the plaintiff's invention, the former being an increasing wrong.² But an injunction should issue where worse mischief would ensue from denying than from granting it;³ though the court will be reluctant to grant it where the patent is recent, the specification obscure, and the proof of infringement meagre.⁴

§ 842. **Considerations of Public Interest.** — An injunction will not be granted where it would occasion great public injury, unless in a case of absolute right,⁵ especially where it would not materially benefit the plaintiff.⁶ Accordingly a preliminary injunction will not be granted *pendente lite* to restrain an electric light company, which is extensively engaged in the business of lighting the streets and other public and private places in a large city, from using certain patented lamps, when it appears that complainant is insolvent, without any plant or property of

Guidet v. Palmer, 6 Fisher, 82; *Hurlburt v. Carter & Co.*, 39 F. 802. An injunction will be refused where its allowance would injure the defendant more than it would benefit the plaintiff. *McCreary v. Pennsylvania Canal Co.*, 5 Fed. Rep. 367; *Day v. Candee*, 3 Fisher, 9; *Morris v. Lowell Mfg. Co.*, 3 Fisher, 67; *North v. Kershaw*, 4 Blatch. 70; *Walker v. Clarke*, 56 L. J. Ch. 239; *Furbish v. Bradford*, 1 Fisher, 317; *Barnard v. Gibson*, 7 Howard, 650.

¹ *Hoe v. Boston Daily Advertiser Co.*, 14 Fed. Rep. 914. A provisional injunction will not be granted against the infringement of a patent whose validity is dependent upon the result of an appeal in a former suit for its infringement, where it appears that defendant has been carrying on its business in good faith, and in ignorance of the alleged infringement, and that a stoppage would be an irreparable injury, while plaintiff has an adequate remedy in damages. *Consolidated Roller-Mill Co. v. Richmond City Mill-Works*, 40 F. 474.

² *Morris v. Lowell Mfg. Co.*, 3 Fisher, 67. See also *Covert v. Curtis*, 25 Fed. Rep. 43. An injunction ought to be refused against the mere user, not being the maker or seller of the invention, if the case is doubtful or the balance of inconvenience is on the side of the defendant. *Howe v. Newton*, 2 Fisher, 531.

³ *Hat-Sweat Mfg. Co. v. Davis Sewing Mach. Co.*, 32 Fed. Rep. 401; *Irwin v. Dane*, 4 Fisher, 359; *Covert v. Curtis*, 25 Fed. Rep. 43. The standing of the plaintiffs in their trade has been held a matter of importance to be considered as a reason for an injunction. *Irwin v. Dane*, 4 Fisher, 359.

⁴ *Muscan Hair Mfg. Co. v. American Hair Mfg. Co.*, 1 Fisher, 320.

⁵ *Blake v. Greenwood Cemetery*, 14 Blatch. 342; *Southwestern Brush Electric Light & Power Co. v. Louisiana Electric Light Co.*, 45 F. 893.

⁶ *Ballard v. City of Pittsburgh*, 12 Fed. Rep. 788.

any sort and unable itself to conduct the business of lighting, so that the injunction would greatly inconvenience the public, and seriously injure the defendant, which would have to take out the lamps and substitute others, not so well adapted to the purpose, while it would be of no benefit to complainant, which is protected by defendant's ability to respond in damages should the infringement be established at the final hearing.¹ But usually when the case is clear and the infringement proved to the entire satisfaction of the court, the injunction will be granted without regard to private or public convenience.² And where the injunction would merely prevent the defendant from purchasing and using any fresh infringing articles it will not be withheld on the ground that the public will be inconvenienced.³

§ 843. **When temporary and when perpetual.** — Injunctions in actions for infringement, as in other cases, may be either preliminary or perpetual. A preliminary injunction is intended to compel the defendant to desist from his alleged infringing acts until it becomes evident that they do not invade the plaintiff's patent, and thus preserve affairs *in statu quo* while the necessary investigation is in progress in the courts.⁴ The purpose of a perpetual injunction is to put an end to the manufacture, use, or sale of the invention by the defendant, until the exclusive privilege of the inventor has expired.⁵ It has been held that for the purpose of a preliminary injunction the extent of the defendant's infringement is immaterial.⁶

§ 844. **Bond and Accounting instead of Injunction.** — There are

¹ *Southwestern Brush, etc. Co. v. La. Elec., etc. Co.*, 45 F. 893. An injunction will not be granted where the device is needed for public use, and the plaintiff can be otherwise protected. *Bliss v. City of Brooklyn*, 4 Fisher, 596.

² *Sickels v. Tileston*, 4 Blatch. 109. See also *Rumford Chemical Works v. Vice*, 14 Blatch. 179; *Morris v. Lowell Mfg. Co.*, 3 Fisher, 67; *Potter v. Muller*, 2 Fisher, 465.

³ *Goodyear v. Railroad Co.*, 1 Fisher, 626; see *Blanchard v. Reeves*, 1 Fisher, 103.

⁴ *Robinson on Patents*, § 1169, citing *Westinghouse Air-Brake Co. v. Carpenter*, 32 Fed. Rep. 484; *American Nicholson Pavement Co. v. City of Elizabeth*, 4 Fisher, 189; *Singer Mfg. Co. v. Union Button-Hole & Embroidery Co.*, 6 Fisher, 480; *Cook v. Ernest*, 5 Fisher, 396. An injunction does not impair the right of trial by jury, but merely aids the party having a legal title to protect it until such trial may be had. *Woodworth v. Rogers*, 3 W. & M. 185.

⁵ *Robinson on Patents*, § 1169.

⁶ *Brickill v. Mayor of New York*, 7 Fed. Rep. 479.

many cases where it would be inequitable arbitrarily and at once to put an end to the manufacture or use of the article upon which the complainant has obtained letters patent if the latter can otherwise be adequately compensated for past acts and made secure against future loss. In such cases, the court may exercise its discretion to require the defendant to render an account and furnish security, pending a final hearing, instead of granting an injunction;¹ or the court may order a bond and frequent accountings.² If a plaintiff has been negligent in enforcing his rights, he is only entitled to compensation and future protection, if this can be secured by bond without an injunction.³ So where the defendant's device is essential to his business, and is made under a later patent, an injunction will be refused and a bond ordered, though the plaintiff's patent is not disputed, if the defendant has acted in good faith;⁴ and a bond may be ordered where an injunction would do the defendant irreparable injury;⁵ or injure him more than it would benefit the plaintiff.⁶ Where priority or novelty is doubtful, the plaintiff grants licenses, and the defendant is responsible, a bond will be ordered;⁷ or the complainant may have an injunction upon giving bond himself.⁸

¹ *New York, etc. Co. v. McGowan*, 23 Fed. Rep. 596; *Wetherill v. Passaic Zinc Co.*, 6 Fisher, 50; *Ely v. Monson & Brimfield Mfg. Co.*, 4 Fisher, 64.

² *New York Packing & Belting Co. v. McGowan*, 23 Fed. Rep. 596; *Eagle Mfg. Co. v. Chamberlain Plow Co.*, 36 F. 905; *Seibert Cylinder Oil-Cup Co. v. Manning*, 32 F. 625.

³ *Jones v. Merrill*, 8 O. G. 401; *Goodyear v. Honsinger*, 3 Fisher, 147. If the patentee has never used his invention or permitted others to use it, a bond will be ordered instead of an injunction. *Hoe v. Knapp*, 27 Fed. Rep. 204. But a motion to substitute a bond for an injunction in order that the defendant may fulfil his contracts will not be granted unless the plaintiff would be adequately protected thereby. *Westinghouse Air-Brake Co. v. Carpenter*, 32 Fed. Rep. 545.

⁴ *United States Annunciator & Bell Telegraph Mfg. Co. v. Sanderson*, 3 Blatch. 184. See also *Dorsey Harvester Revolving Rake Co. v. Marsh*, 6 Fisher, 387. An injunction will be denied and a bond ordered where the defendant's machine embraces improvements which cannot be used without the original. *Howe v. Morton*, 1 Fisher, 586.

⁵ *Eastern Paper Bag Co. v. Nixon*, 45 O. G. 1571.

⁶ *McCreary v. Penn. Canal Co.*, 5 Fed. Rep. 367.

⁷ *National Hat Pouncing Mach. Co. v. Hedden*, 29 Fed. Rep. 147; *McMillan v. Conrad*, 16 Fed. Rep. 128; *Greenwood v. Bracher*, 1 Fed. Rep. 856. A patentee should sue the infringing makers rather than their vendees; and when he attacks the latter first, a bond will be ordered rather than an injunction. *Irwin v. McRoberts*, 4 Bann. & A. 411.

⁸ *Heysinger v. Dennison Mfg. Co.*, 15 Phila. 509. A bond may be ordered

But a bond will be ordered and an injunction denied if the former answers the purpose as well, although the patent has been sustained by repeated judgments and the infringement is clear.¹ And a bond will be ordered rather than an injunction pending a writ of error in the supreme court.² Not even a bond will be required of defendant, except in cases where an injunction would otherwise issue.³ But a bond should in no clear case of infringement be accepted in lieu of an injunction if only the latter will afford the complainant the protection to which he is entitled.⁴

§ 845. **Remedy by Action on Contract.** — A patentee is not entitled to an injunction, as for an infringement, against his licensee who has merely violated the terms of the agreement under which he acquired authority to sell or use the patented article. Thus, where in a suit for the infringement of letters patent, for improvements in sewerage and draining towns, it appeared that defendant had paid a royalty on the flush tanks used, and that, before it put in its system of sewers, plaintiff had notified defendant, in response to a question, that he claimed a royalty, it was held that, defendant having acted under an implied license, a bill for injunction and accounting would not lie; the proper remedy being an action at law for recovery of the royalty.⁵

§ 846. **Questions of Infringement not determined upon Contempt Proceeding.** — Where an injunction has been granted and the defendant subsequently obtains letters patent upon what he claims to be a different invention but which plaintiff claims to be identical with that in litigation, the court will not determine the question of infringement upon a proceeding for contempt, but will leave the plaintiff to an original suit wherein the defendant may have a right of appeal.⁶ But where the principle

where a late decision of the supreme court renders the law of the case questionable. *Eastern Paper Bag Co. v. Nixon*, 35 Fed. Rep. 752.

¹ *Blake v. Robertson*, 6 Fisher, 509. Compare *McWilliams Mfg. Co. v. Blundell*, 11 Fed. Rep. 419; *Tracey v. Torrey*, 2 Blatch. 275. But a patentee, using the invention himself, has a right to an injunction, not merely a bond and account. *Consolidated Fruit Jar Co. v. Whitney*, 10 Phila. 268.

² *Wells v. Gill*, 6 Fisher, 89.

³ *American Middlings Purifier Co. v. Atlantic Milling Co.*, 4 Dillon, 100.

⁴ *Westinghouse A. B. Co. v. Carpenter*, 32 F. 545.

⁵ *Drainage Construction Co. v. City of Chelsea*, 41 F. 47.

⁶ *Temple Pump Co. v. Goss Pump & Rubber Bucket Mfg. Co.*, 31 F. 292. See also *Wirt v. Brown*, 30 F. 187.

involved in a patent is the point in issue in a suit to restrain its infringement, the defendant will commit a breach of a preliminary injunction, and be punishable for contempt, where, for the purpose of evading the injunction, he continues to manufacture articles involving the same principle, with but slight modifications of structure.¹

III. COPYRIGHTS.

- A.* Nature of the Rights, how violated, and Basis of Equitable Jurisdiction.
B. Principles applied.

A. NATURE OF THE RIGHTS, HOW VIOLATED, AND BASIS OF EQUITABLE JURISDICTION.

§ 847. Nature of the Title to be protected.	§ 853. How far Honesty of Intention important.
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849. When Title protected.	855. Citations of Authority.
850. Similar Rules govern as in Patent Cases.	856. How Question of Infringement determined.
851. Acts which will be enjoined as Infringements.	857. Equitable Jurisdiction based upon Protection of Property Interest and Inadequacy of Legal Remedies.
852. Taking Quotations and Extracts.	

§ 847. **Nature of the Title to be protected.** — The purpose of the statute on the subject of copyright is to protect the common law right still remaining unimpaired after the literary production is in print without affecting the right prior to publication.² It is not thought necessary, or even proper, in this place to enter into a discussion of the requisite steps for obtaining copyright, or of the full extent of the right after being acquired. These matters have been considered of sufficient importance to justify a separate treatise.³ It may be proper to state, however, that a substantial compliance with all the conditions and requirements of the act of Congress on the subject must be shown in order to entitle a complainant to equitable protection after

¹ *Barr v. Kimbark*, 29 F. 428.

² *Millar v. Taylor*, 4 Burr. 2303; *Boucicault v. Wood*, 16 Am. Law Reg. 539; s. c. 2 Biss. 34; *Wheaton v. Peters*, 8 Pet. 591; *Woolsey v. Judd*, 4 Duer, 389. And see *Keane v. Wheatley*, 9 Am. Law Reg. 33. The common law right in literary property fully considered in the next chapter.

³ See *Drone on Law of Copyright*; *Curtis on Copyright*; Rev. Stat. U. S. § 4956.

the publication of his manuscript.¹ Though the requirements of acts 1790 and 1802 were somewhat different from those of the act of 1874 as modified and supplemented in 1891, yet the rule as to compliance with conditions and the judicial construction of acts intended as a compliance are the same.² With respect to the character of title which the complainant must establish in order to obtain the benefit of injunction to protect a patent right or copyright, it is sufficient that he show a clear equitable title.³

§ 848. **Libellous and Immoral Publications not protected.** — There cannot exist any copyright entitled to the protection of a court of equity in any work of a clearly irreligious, immoral, libellous, or obscene character; and where there is any real

¹ *Wheaton v. Peters*, 8 Pet. 591; *Struve v. Schwedler*, 4 Blatch. 23; *Parkinson v. Laselle*, 3 Sawy. 330; *Baker v. Taylor*, 2 Blatch. 82; *Chase v. Sanborn*, 6 Pat. Off. Gazette, 932; *Jollie v. Jacques*, 1 Blatch. 618. And see *Callaghan v. Myers*, 128 U. S. 617. A slight mistake in the date of copyright required to be printed upon the titlepage will not deprive one of the right to have it protected by injunction. See *Low v. Routledge*, 33 L. J. N. S. Ch. 717; *Henderson v. Maxwell*, 4 Ch. D. 163; *Matheson v. Harrod*, L. R. 7 Eq. 270; *Correspondent Newspaper Co. v. Saunders*, 12 L. T. N. S. 540; *Murray v. Bogue*, 1 Drew. 353. Compare *Baker v. Taylor*, 2 Blatch. (U. S.) 82, holding a mistake of a year fatal to the application.

² In *Wheaton v. Peters*, 8 Pet. 591, 663, decided under the earlier statutes, the court says: "But we are told they are unimportant acts. If they are indeed wholly unimportant, Congress acted unwisely in requiring them to be done. But whether they are important or not is not for the court to determine, but the legislature; and in what light they were considered by the legislature we can learn only by their official acts. Judging, then, of these acts by this rule, we are not at liberty to say they are unimportant, and may be dispensed with. They are acts which the law requires to be done, and may this court dispense with their performance? But the inquiry is made, Shall the non-performance of these subsequent conditions operate as a forfeiture of the right? The answer is that this is not a technical grant of precedent and subsequent conditions. All the conditions are important; the law requires them to be performed, and consequently their performance is essential to a perfect title. The rule by which conditions, precedent and subsequent, are construed, in a grant, can have no application to the case under consideration, as every requisite in both acts is essential to the title."

³ *Drone on Copyright*, p. 500; *Chappell v. Purdy*, 4 Y. & C. Exch. 485, 493; *Mawman v. Tegg*, 2 Russ. 385; *Bohn v. Bogue*, 10 Jur. 420; *Hodges v. Welsh*, 2 Ir. Eq. 266; *Colburn v. Duncombe*, 9 Sim. 151; *Sweet v. Carter*, 11 Sim. 572; *Lawrence v. Dana*, 2 Am. L. T. (U. S.) N. S. 402; *Pulte v. Derby*, 5 McLean, 328; *Little v. Gould*, 2 Blatch. (U. S.) 165, 369; *Sims v. Marryat*, 17 Q. B. 281; *Turner v. Robinson*, 10 Ir. Ch. 121, 510. See *Walcott v. Walker*, 7 Ves. 1; *Lawrence v. Smith*, Jac. 471; *Southey v. Sherwood*, 2 Meriv. 435. See also *Martinette v. Maguire*, 1 Abb. (U. S.) 356.

doubt whether a book upon which a colorable copyright has been obtained falls within either of these classes or not, courts of equity will not interfere by injunction to prevent or put an end to piracy.¹ The rule refusing protection to indecent, obscene, and irreligious publications applies to indecent dramatic productions and performances.²

§ 849. **When Title protected.** — As a general rule, the protection is extended to the literary production only, and not to the mere title of the book or publication, the latter being considered to be a mere incident or appendage to the product of the mind which is the real subject of the copyright.³ But where one pub-

¹ Mr. Justice Story, though giving his adherence to the view here expressed (see Eq. Jur. 936), seems to have had some misgivings as to the soundness of his position. He adds in a note, "I am not aware that Lord Eldon has held the opposite of this doctrine; and that is, that if it does admit of real doubt, whether the work be irreligious, immoral, libellous, or seditious, or not, an injunction ought to be denied, upon the mere ground of the doubt. It has been thought that there is great difficulty in adopting this doctrine, denying the protection of an injunction in matters of property upon mere doubts. *Prima facie* the copyright confers title; and the *onus* is on the other side to show clearly that, notwithstanding the copyright, there is an intrinsic defect in the title." But the reason advanced by this learned author and jurist in the next section seems convincing to the effect that the interests of society are best promoted by a policy of non-interference. § 937. In *Lawrence v. Smith*, Jac. 471, doubt appearing as to whether the work for the protection of which an injunction was sought impugned the doctrine of the Scriptures, the relief was refused. In this case Lord Eldon said: "Looking at the general tenor of the work, and at many particular parts of it, recollecting that the immortality of the soul is one of the doctrines of the Scriptures, considering that the law does not give protection to those who contradict the Scriptures, and entertaining a doubt, I think a rational doubt, whether this book does not violate that law, I cannot continue the injunction. The plaintiff may bring an action, and when that is decided he may apply again."

² *MartINETTE v. Maguire*, 1 Deady (U. S.), 216; s. c. 1 Abb. (U. S. R.) 356. See *Shook v. Daly*, 49 How. (N. Y.) Pr. 366; s. c. 1 N. Y. Weekly Dig. 198.

³ In *Osgood v. Allen*, 1 Holmes, 185, 192, Shepley, J., delivering the opinion, said: "By the plain terms of the statute the copyright protected is the copyright in 'the book,' the word 'book' being used to describe any literary composition. Although a printed copy of the title of such book is required, before the publication, to be sent to the Librarian of Congress, yet this is only as a designation of the book to be copyrighted; and the right is not protected under the statute until the required copies of such copyrighted books are, after publication, also sent. It is only as a part of the book, and as a title to that particular literary composition, that the title is embraced within the provision of the act. It may possibly be necessary in some cases, in order to protect the copyrighted literary composition, for courts to secure the title from piracy, as well as the other productions of mind of the author in the book. The right secured by the act, however, is the property in the literary composition, the

lishes a book in such a way that the name or title given it forms a part of the book, it seems another person may be enjoined from using the same name or title.¹ And it is well settled that where a name or title is made in such form and by such workmanship that it answers the purpose of a trademark, it alone will be protected by injunction against a fraudulent or colorable imitation intended to deceive the public and induce persons to purchase defendant's publication under the false impression that it is plaintiff's. The relief in such case is granted upon general equitable principles, and is not based upon any right of protection for a copyright.² But one who has copyrighted a dramatic composition under a given title cannot have enjoined another from producing an entirely different play under the same or a similar title in the absence of bad faith, since the use of any given word of general signification as a title for a literary work

product of the mind and genius of the author, and not in the name or title given to it. The title does not necessarily involve any literary composition; it may not be, and certainly the statute does not require that it should be, the product of the author's mind. It is not necessary that it should be novel or original. It is a mere appendage, which only identifies, and frequently does not in any way describe, the literary composition itself, or represent its character. By publishing in accordance with the requirements of the copyright law a book under the title of the life of any distinguished statesman, jurist, or author, the publisher could not prevent any other author from publishing an entirely different and original biography under the same title. When the title is original, and the product of the author's own mind, and is appropriated by the infringement, as well as the whole or a part of the material composition itself, in protecting the other portions of the literary composition courts would probably also protect the title. But no case can be found, either in this country or England, in which under the law of copyright courts have protected the title alone, separate from the book which it is used to designate." To same effect is *Jollie v. Jacques*, 1 Blatch. 629.

¹ *Bradbury v. Beeton*, 39 L. J. Ch. n. s. 57; *Benn v. Le Clercq*, 18 Int. Rev. Rec. (Pa.) 94; *Weldon v. Dicks*, 10 Ch. D. 247; *Chappell v. Davidson*, 2 Kay & J. 128; s. c. on appeal, 8 De G. M. & G. 1; *Mack v. Petter*, L. R. 14 Eq. 431; *Chappell v. Sheard*, 2 Kay & J. 117; *Matsell v. Flanagan*, 2 Abb. Pr. (N. Y.) n. s. 459; *Hogg v. Kirby*, 8 Ves. 215; *Constable v. Brewster*, 3 Sc. Sess. Cas. 214; *Prowett v. Mortimer*, 2 Jur. n. s. 414; *Ingram v. Stiff*, 5 Jur. n. s. 947; *Clement v. Maddick*, 1 Giff. 98; *Bradbury v. Dickens*, 27 Beav. 53; *Ward v. Beeton*, 19 Eq. 207; *Kelly v. Hutton*, Law Rep. 3 Ch. 703; *Meltzer v. Wood*, 8 Ch. D. 606; *Jollie v. Jacques*, 1 Blatchf. (U. S.) 618; *Osgood v. Allen*, 1 Holmes (U. S.), 185; *Harte v. De Witt*, 1 Cent. L. J. 360.

² *Chappell v. Sheard*, 2 Kay & J. 117; s. c. 1 Jur. n. s. 996; 3 W. R. 646; *Matsell v. Flanagan*, 2 Abb. Pr. n. s. 459; *Chappell v. Davidson*, 2 Kay & J. 128; s. c. on appeal, 8 De G. M. & G. 1.

cannot be monopolized by any one.¹ On the same principle, an injunction will be refused where sought by one who has copyrighted a drama under a title not original with himself to prevent others who have applied the same title to a dramatic composition founded upon the same story upon which complainant's title is founded to prevent its production.²

§ 850. **Similar Rules govern as in Patent Cases.** — The grounds for equitable interference to protect copyrights are substantially the same as in patent cases;³ and, as in the latter, United States courts have exclusive jurisdiction for the protection of statutory copyright.⁴ Nor is there any practical difference between the rules governing the courts in patent cases and those involving copyrights, as respects the stage at which the injunction will be granted and the precedent conditions to granting this form of relief.⁵ But there are some characteristics of copyrights not incident to patent rights which will be observed as the discussion proceeds.

§ 851. **Acts which will be enjoined as Infringements.** — The question of what constitutes an infringement rather than a fair use of another's copyrighted production by a subsequent writer depends less upon the intention of the latter than upon the actual results. The most that can be said in a general way is that where a subsequent work by reason of its materials having been taken from a prior work is made to answer to any extent as a substitute for it, a proper case is presented for relief by injunction; and whether this result has been accomplished may be determined by the court upon an inspection and comparison in each case.⁶ An injunction may be granted against a publication which is an infringement in part only, as when part of complainant's work is entitled to copyright and protection as such,⁷

¹ *Isaacs v. Daly*, 39 N. Y. Sup. Ct. 511.

² *Benn v. Le Clercq*, 18 Int. Rev. Rec. (Pa.) 94.

³ *Wilkins v. Aikin*, 17 Ves. 422; *Sanders v. Smith*, 3 Myl. & Cr. 728. See *Dudley v. Mayhew*, 3 N. Y. 9.

⁴ Rev. Stat. §§ 629, 4970; *Dudley v. Mayhew*, 3 N. Y. 9.

⁵ *Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 705, 706; *Wilkins v. Aikin*, 17 Ves. 424. See also *Eden on Injunct.* ch. 13, p. 284; *Tonson v. Walker*, 3 Swanst. 679.

⁶ For a learned discussion by an English court of what constitutes piracy, see *Jerrold v. Houlston*, 3 K. & J. 708; also *Crookes v. Petter*, 6 Jur. n. s. 1131.

⁷ *Low v. Ward*, L. R. 6 Eq. 415.

or where, as is usually the case, the infringement is of part, the whole of which has been properly copyrighted. The usual practice is to enjoin the infringing part only where it is easily distinguishable from the remainder.¹ But the court will not delay relief until the pirated parts have been definitely ascertained.² Wood engravings printed in a book as illustrations of the stories therein, or using them in a book as illustrations of different stories, is an infringement of a copyright which may be restrained by injunction.³ So a book may be given an external appearance so far resembling a copyrighted work as to constitute an infringement entitling the owner of the copyright to an injunction.⁴ Nor is it necessary that the book alleged to infringe should have been actually published for sale or general distribution. Thus, where the defendants bought a copy of the book, and compiled for their own use with its aid a new and independent work, as alleged, which was their own private telegraph code, and they distributed copies of their book among their agents at home and abroad, but they had not printed their book for sale or exportation, it was held that the defendants had infringed the copyright of the plaintiff, and that a perpetual injunction must be granted.⁵ But injunction will not lie to restrain the publication and sale of a cyclopædia of the same name as one published by complainants, and of the same contents, except as to certain copyrighted articles, when defendants

¹ *Carnan v. Bowles*, 2 Bro. C. C. 81; s. c. 1 Cox, 283; *Farmer v. Elstner*, 33 Fed. Rep. 494.

² *Kelly v. Morris*, L. R. 1 Eq. 697.

³ *Bogue v. Houlston*, 10 Eng. Law & Eq. 215; 5 De Gex & Smale, 267; *Bradbury v. Hotten*, L. R. 8 Ex. 1.

⁴ *Metzler v. Wood*, 8 Ch. D. 606; *Talcott v. Moore*, 1 N. Y. Weekly Dig. 485; *Chappell v. Davidson*, 2 Kay & J. 123; *Mack v. Petter*, Law Rep. 14 Eq. 431; *Spottiswoode v. Clarke*, 2 Ph. 154. Plaintiffs, who owned the copyright of E. P. Roe's novels, published them in two editions, one printed on thin paper with paper covers, and retailing at 50 cents a copy, and the other handsomely finished, and bound in cloth, retailing at \$1.50 a copy. Defendants purchased over 60,000 copies of the paper edition, and, binding them in cloth so that they resembled somewhat plaintiffs' cloth edition, offered them for sale at 40 cents each in thousand lots, the purchasers afterwards retailing them at about 60 cents. Defendants' circulars stated that they were "the paper E. P. Roe book bound in cloth, which is an exact copy of the genuine \$1.50 edition." Held, that an injunction prohibiting such sales was properly denied. *Mitchell, J.*, dissenting. *Dodd v. Smith*, (Pa. Sup.) 22 A. 710.

⁵ *Ager v. Pen. & O. S. N. Co.*, L. R. 26 Ch. Div. 637.

have not infringed any copyright, and use no means to persuade the public that their publication is that of complainants.¹

§ 852. **Taking Quotations and Extracts.** — It is a well-settled principle that a copyright may be infringed as well under color of making extracts whereby the most important materials in the original are taken, though properly credited, as by outright and entire appropriation. But the exact limitation of this rule cannot be strictly defined, since the court must in each case consider not only the nature and the object of the selections made, but their quantity as well.² The most valuable portion of a copyrighted production may be taken in this way, although the matter taken constitute but a small portion of the original work in quantity.³ And where quotations and citations go so far as to supersede the original work and answer as a substitute for it, a proper case is presented for equitable interference. Accord-

¹ *Black v. Ehrich*, 44 F. 793. For further illustrations and clear expositions of the rights of authors, artists, and the like, in their copyrighted productions, see Story's Eq. Jur. §§ 938 *et seq.*, and notes, and the opinion of the vice-chancellor in *Campbell v. Scott*, 11 Simons, 31.

² *Folsom v. Marsh*, 2 Story (U. S.), 100; *Farmer v. Calvert*, L. E. & M. P. Co., 5 Chicago Leg. N. 1; *Gray v. Russell*, 1 Story (U. S.), 11; *Bramwell v. Halcomb*, 3 Myl. & Cr. 738. In *Folsom v. Marsh*, Justice Story said: "We must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work. Many mixed ingredients enter into the discussion of such questions. In some cases a considerable portion of the materials of the original work may be fused, if I may use such an expression, into another work, so as to be undistinguishable in the mass of the latter, which has other professed and obvious objects, and cannot fairly be treated as a piracy; or they may be inserted as a sort of distinct and mosaic work into the general texture of the second work, and constitute the peculiar excellence thereof, and then it may be a clear piracy. If a person should, under color of publishing 'elegant extracts' of poetry, include all the best pieces at large of a favorite poet, whose volume was secured by a copyright, it would be difficult to say why it was not an invasion of that right, since it might constitute the entire value of the volume." An injunction was held to lie to restrain a defendant, whose book consisted of statistical tables taken bodily from plaintiff's work. *Scott v. Sanford*, L. R. 8 Eq. 718.

³ *Bramwell v. Halcomb*, 3 Myl. & Cr. 738; *Gray v. Russell*, 1 Story's R. 11; *Farmer v. Calvert*, L. E. & M. P. Co., 5 Chicago Legal News, 1. The publication in a magazine without the author's or owner's consent of the manuscript of a dramatic composition will be enjoined as an infringement. *Macklin v. Richardson*, Amb. 694. When a periodical work devoted to theatrical criticism had published extracts from plaintiff's play with criticisms thereon, it was held not to be an infringement entitling plaintiff to the relief sought. *Whittington v. Wooler*, 2 Swanst. 428.

ingly, where a defendant admitted by an answer that he had copied portions of complainant's work, though he insisted that his work was a distinct work, and not merely an abridgment of the complainant's, and that the matter taken constituted only a small portion of complainant's work, an injunction was granted.¹ So, while it is proper to publish copious extracts from a publication for purposes of legitimate criticism, yet the office of critic will not be allowed to be abused as a pretext for making an

¹ *Wilkins v. Aikin*, 17 Ves. 422. In this case Lord Eldon said: "There is no doubt that a man cannot, under the pretence of quotation, publish either the whole or part of another's work; though he may use what it is in all cases difficult to define, fair quotation. Difficulties have arisen in cases that have occurred upon what I should have taken the same course by sending them to the consideration of a court of law. In the case of maps, for instance, one man publishes the map of a county, another man, with the same design, if he has equal skill and opportunity, will, by his individual labor, produce almost a fac-simile, and has a right to do so; but from his right through that medium was it ever contended that he might copy the other map? Suppose a publication professing to be an account of the improvement of the maps of the county of Middlesex, compiling the history of all the maps of it ever published, pointing out the peculiarities belonging to them, and giving copies of them all, as well those the copyrights of which have expired, as those of which it was subsisting; it is not easy to say with certainty what would be the decision upon such a case. If it was a fair history of the maps of the county which had been published, and the publication of the individual map was merely an illustration of that history, that is one way of stating it; but if a jury could perceive the object to make a profit by publishing the map of another man, that would require a different consideration. The slightest circumstances, therefore, in these cases make the most important distinction. So in the case of a book of roads, there is no doubt that, though any man may publish a book of roads that would be precisely the same as Patterson's, yet he cannot take that book and copy it. The fair question, therefore, upon such a compilation as this, is whether it is competent to the defendant to publish to the world the plates, which it is admitted he could not publish as copies of the plaintiff's. I have no doubt that both these parties are actuated by very honorable views. Upon inspection of the different works I observe a considerable proportion taken from the plaintiff's, that is acknowledged; but also much that is not; and in determining whether the former is within the doctrine upon this subject, the case must be considered as also presenting the latter circumstance. The question upon the whole is, whether this is a legitimate use of the plaintiff's publication in the fair exercise of a mental operation, deserving the character of an original work. The effect, I have no doubt, is prejudicial; it does not follow, that therefore there is a breach of a legal right; but where that is so, and there is a fair question, the injunction ought not to be dissolved, but according to the usual course, maintaining the injunction, an action should be brought forthwith. The proper course in this instance will be to permit this work to be sold in the mean time, the defendant undertaking to account according to the result of the action."

entire reproduction. And a proprietor of a newspaper will be enjoined from publishing in his paper extensive extracts from a novel without attempting any criticism upon the same.¹ But while, as has been stated, a subtraction of all the important parts of a publication, or of any material portion, will constitute an infringement for which an injunction lies, yet the legitimate publication of extracts does not constitute such piracy of literary property as to render the one taking them amenable to an action for an injunction.²

§ 853. **How far Honesty of Intention important.** — The use which a subsequent writer may make is a fair use, and only such as will not cause substantial injury to the proprietor of the first publication.³ And to determine whether the copying from a copyrighted work amounts to a piracy or a "fair use," the court will look more at the value than to the quantity of matter taken.⁴ The fact that the infringement was for a good purpose or with an honest intention constitutes no defence to an action for infringement, since courts proceed on the ground of protecting the owner's property rights in his publication, and can look only at results; besides it is a fair presumption in such cases that one who knowingly abstracts that which belongs to another intends all which its publication effects. But the fact that the intention is innocent will be given consideration as having a bearing upon the question of "fair use" where the amount taken is small, and a court of equity will give such fact due effect in determining whether or not an injunction should be granted, especially where to grant it would occasion great loss and inconvenience to the defendant, and to refuse it would result in but little or no injury to complainant.⁵ It cannot be said, however,

¹ *Dickens v. —*, cited 8 L. J. Ch. n. s. 141. See also *Bohn v. Bogue*, 10 Jur. 420.

² *Bell v. Whitehead*, 3 Jur. 68. On a motion for a preliminary injunction to restrain an infringement of a copyright, when plaintiff showed a copyright of a book, and a copy of a book having the same title, also that defendant was publishing a book containing extracts from it, but failed to show that the copy shown was a copy of the book copyrighted, and defendant denied that it was, it was held that there was no ground for a preliminary injunction. *Humphrey's Homeopathic Medicine Co. v. Armstrong*, 30 F. 66.

³ *Lawrence v. Dana*, 4 Cliff. (U. S.) 1. See *Webb v. Powers*, 2 Woodb. & M. (U. S.) 497.

⁴ *Farmer v. Calvert Lith. Engr. & Map Publ. Co.*, 1 Flipp. (U. S.) 228; *Gray v. Russell*, 1 Story (U. S.), 11.

⁵ *Lodge v. Stoddart*, 9 Rep. 137; 19 Am. L. Reg. 433; *Spottiswoode v. Clarke*, 2 Phillips, 157.

that the honesty of intention on the part of an infringer constitutes in itself a legal defence.¹

§ 854. **Same — Maps and Charts.** — The difficulty of determining what is legitimate use of a former production and what infringement is greatest in the case of maps, charts, and the like, in which there is not, and cannot be, any originality in the facts or materials of which they are composed, and which facts and materials are open to all. The rule laid down by Mr. Copinger is as follows: "The rule appears now to be settled that a compiler of a work in which absolute originality is of necessity excluded is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labor upon what he has taken, and subjects it to such revision and correction as to produce an original result, provided that he does not deny the use made of such preceding works, and the alterations are not merely colorable."²

§ 855. **Citations of Authority.** — How far an author of a later work may profit by citations of authorities found in a prior publication has never been decided in this country. It is not, however, considered to be improper to use a former publication as a guide to authorities which a subsequent writer on the subject examines for himself for the purpose of deducing his own conclusions therefrom. This view is substantially supported in an English case, where it was also held that an author may not copy the quotations or extracts from a former work, but should go to the original sources when such extracts were taken.³ The court will consider whether the use made of the quotation is a fair one.

§ 856. **How Question of Infringement determined.** — The court will either examine or have examined by a referee the work alleged to be a piracy by reason of its consisting in whole or in part of matter taken from an original publication and used with

¹ *Lawrence v. Dana*, 4 Cliff. (U. S.) 1; *Webb v. Powers*, 2 Woodb. & M. (U. S.) 524; *Reade v. Lacey*, 1 Johns. & H. 526; *Millett v. Snowden*, 1 West. L. J. 240; *Reed v. Holliday*, 19 Fed. Rep. 325; *Carey v. Fadden*, 5 Ves. 23; *Story v. Holcombe*, 4 McLean (U. S.), 306; *Scott v. Stanford*, L. R. 3 Eq. 723.

² Copinger, *Law Cop.* 91. Further as to how far maps may be used in producing other maps, see *Jeremy on Eq. Juris.* B. 3, ch. 2, § 1, p. 322, 323; *Wilkins v. Aikin*, 17 Ves. 424, 425; *Longman v. Winchester*, 16 Ves. 269, 271; *Matthewson v. Stockdale*, 12 Ves. 270; *Carey v. Fadden*, 5 Ves. 24; *Eden on Injunct.* ch. 13, p. 282, 283.

³ *Pike v. Nicholas*, 39 L. J. N. S. Ch 435. See also *Jerrold v. Heywood*, 18 W. R. 279.

colorable alterations to destroy its identity with a view of determining whether it has been in fact so prepared or is the result of original investigation and combination of materials obtained from common sources of information.¹

§ 857. **Equitable Jurisdiction based upon Protection of Property Interest and Inadequacy of Legal Remedies.** — The exercise of equitable jurisdiction is dependent upon the legal right, and is exercised for the purpose of rendering the right more effective, and on the ground that legal remedies are inadequate.² It rests, as in other cases where an exclusive right is to be protected, upon the necessity of preventing irreparable mischief, avoiding numerous actions, and providing a more efficacious remedy and better protection for authors and publishers than that afforded by courts of law. None of the evils of vexatious litigation can be provided against at law; nor can a court of law furnish any protection or guaranty against future wrongs of a similar character. But in equity a complainant may not only obtain an injunction against future infringements, but have an accounting for the proceeds of past infringements.³

B. PRINCIPLES APPLIED.

§ 858. **Dramatic Compositions.**

- 859. Adaptation protected.
- 860. Spectacular Parts protected.
- 861. How infringed—Reproduction from Memory.
- 862. Abridgment—Compilation.
- 863. Translations.
- 864. Law Reports Result of Individual Enterprise protected.
- 865. Opinions of Judges and Official Reports not protected.
- 866. Newspapers—Periodicals.
- 867. Directory—Almanac.
- 868. Maps and Charts—Guide-book.

§ 869. **Paintings.**

- 870. Mechanical Contrivance not covered by Copyright.
- 871. Violation of Contracts connected with Copyright.
- 872. Same—Between Authors and Publishers.
- 873. Diligence in seeking Relief—Complainant's Acquiescence.
- 874. Previous Establishment of Right at Law no longer required.
- 875. What considered in granting and refusing Relief.
- 876. Relative Injury and Inconvenience.

§ 858. **Dramatic Compositions.** — Injunction is frequently invoked for the protection of copyrighted dramatic compositions,

¹ *Emerson v. Davies*, 3 Story's R. 798; *Webb v. Powers*, 2 Woodb. & M. 497. And see *Carnan v. Bowles*, 1 Cox, 283; s. c. 2 Bro. C. C. 81.

² *Drone on Copyright*, p. 496. See also *Pierpont v. Fowle*, 2 Woodb. & M. 23; *Wilkins v. Aikin*, 17 Ves. 422; *Bramwell v. Halcomb*, 3 Myl. & Cr. 737; *Spottiswoode v. Clarke*, 2 Ph. 154; *Lawrence v. Smith*, Jac. 471; *Hogg v. Kirby*, 8 Ves. 215.

³ *Pierpont v. Fowle*, 2 Woodb. & M. 23. The fact that a *qui tam* action for the penalty allowed by law is pending, is no bar to an injunction. *Schumaker v. Schwencke*, 25 F. 466.

to prevent their unauthorized publication or representation upon the stage. When protection is sought under the copyright law, jurisdiction is of course exercised exclusively in the federal courts, and due compliance with all the conditions with respect to procuring copyright must be shown. Where plaintiff seeks protection against the infringement of a dramatic composition he must make clear proof of his title, either as author or by purchase; and if it appears that his play is merely a colorable imitation, the relief will be denied. The same rule applies where both plaintiff and defendant are unable to establish the originality of their productions; since in such case they are considered *in pari delicto*, equity will decline to interfere.¹ And a novel written by the owner of a copyright in a dramatic composition, and founded upon such play, and containing several scenes from such play, may be the subject of copyright or property to the extent of entitling its owner to have enjoined as an infringement a defendant who afterwards dramatizes the novel by taking the scenes therefrom.²

§ 859. **Adaptation protected.** — Protection by injunction will be extended to a dramatic composition which is adapted from another with new and different results attained by original and independent labor. Thus, the owner of the manuscript of an original adaptation of a play which has been produced in a foreign country, may recast and change it by original labor so as to adapt it to the American stage, and will be protected by injunction against an infringement of the improved composition and cast.³ So an original operetta containing score and name is recognized as property at common law; and so far as unpublished its owner will be protected from its fraudulent imitation, even though the operetta be an adaptation of an old play.⁴

§ 860. **Spectacular Parts protected.** — It seems to be well settled that where the spectacular parts and scenic effects of a play are not amenable to the charge of indecency or immorality, the owner of the dramatic composition to which these are important adjuncts is as much entitled to an injunction to prevent their being reproduced as he is to prevent the reproduction or publi-

¹ *Martinette v. Maguire*, 1 Abb. (U. S.) 356; 1 Deady, 216.

² *Reade v. Lacey*, 80 L. J. Ch. n. s. 655.

³ *French v. MacGuire*, 55 How. Pr. 471.

⁴ *Aronson v. Fleckenstein*, 28 F. 75.

cation of the words or lines of the composition itself. This is an obviously just principle when it is considered that all the attractive and really valuable parts of a play might otherwise be effectually pirated, and used in the same order as in the original, so as to produce the same sensations and impressions upon the audience. Accordingly, the protective powers of courts extend to the spectacular parts as well as to the words of a copyrighted dramatic composition.¹

¹ *Daly v. Palmer*, 6 Blatch. 256. In this case, Blatchford, J., delivering the opinion, said: "Boucicault has, indeed, adapted the plaintiff's series of events to the story of his play, and in doing so has evinced skill and art; but the same use is made in both plays of the same series of events, to excite by representation the same emotions in the same sequence. There is no new use, in the sense of the law, in B.'s play, of what is found in the plaintiff's 'railroad scene.' The 'railroad scene' in B.'s play contains everything which makes the 'railroad scene' in the plaintiff's play attractive as a representation on the stage. As in the case of a musical composition, the air is the invention of the author, and a piracy is committed if that in which the whole meritorious part of the invention consists is incorporated in another work, without any material alteration in sequence of bars, so in the case of a dramatic composition designed or suited for representation, the series of events directed in writing by the author, in any particular scene, is his invention, and a piracy is committed if that in which the whole merit of the scene consists is incorporated in another work, without any material alteration in the constituent parts of the series of events, or in the sequence of the events in the series. The adaptation of such series of events to different characters who use different language from the characters and from the language of the first play, is like the adaptation of the musical air to a different instrument, or the addition to it of variations or of an accompaniment. The original subject of invention, that which required genius to construct it and set it in order, remains the same in the adaptation. A mere mechanic in dramatic composition can make such adaptation, and it is a piracy if the appropriated series of events when represented on the stage, although performed by new and different characters, using different language, is recognized by the spectator through any of the senses to which the representation is addressed, as conveying substantially the same impression to, and exciting the same emotion in the mind in the same sequence or order. Tested by these principles, the 'railroad scene' in B.'s play is undoubtedly, when acted, performed, or represented on a stage or public place, an invasion or infringement of the copyright of the plaintiff in the 'railroad scene' in his play. The substantial identity between the two scenes would naturally lead to the conclusion that the later one had been adapted from the earlier one." An excellent illustration of the rule that equity will decline to interfere to prevent the reproduction of an indecent spectacular performance is the case of *Martinette v. Maguire*, 1 Deady, 216; 1 Abb. (U. S.) 356, where it was sought to have enjoined a reproduction of the play known as "Black Crook." Deady, J., said: "'The Black Crook' is a mere spectacle, — in the language of the craft, a spectacular piece. The dialogue is very scant and meaningless, and appears to be a mere accessory to

§ 861. **How infringed—Reproduction from Memory.**—An injunction will be granted against one who has learned the words and arrangements of a drama from those who have seen it performed, to restrain him from publishing it.¹ And where complainant, being the exclusive owner of the play, alleged that it had been repeatedly produced both by the author in England and by himself in the United States, without any intention of abandoning it, or of conferring upon any other person the right of printing or publishing it, and that defendant had, without his authority or consent, and in disregard of his proprietary rights therein, published and sold copies of the drama, an injunction was granted, notwithstanding the defendant's answer in the nature of a confession and avoidance admitting the publishing, but justifying on the ground that the presentations of the play in public by complainant amounted to a prior publishing and dedication to the public by complainant, and setting up that he had acquired the words, arrangement, divisions, and stage directions, from persons who had learned them by witnessing its performance on the stage as spectators.²

the action of the piece, — a sort of verbal machinery tacked on to a succession of ballet and tableaux. The principal part and attraction of the spectacle seems to be the exhibition of women in novel dress or no dress, and in attractive attitudes or action. The closing scene is called 'Paradise,' and, as witness Hamilton expresses it, consists mainly 'of women lying about loose,' — a sort of Mohammedan paradise, I suppose, with imitation grottos and unmaidenly houris. To call such a spectacle a 'dramatic composition' is an abuse of language, and an insult to the genius of the English drama. A menagerie of wild beasts or an exhibition of model artists might as justly be called a dramatic composition. Like those, this is a spectacle; and although it may be an attractive and gorgeous one, it is nothing more." See also *Shook v. Daly*, 49 How. Pr. 366. It is not thought that the difference in the wording of Act of Congress, July 8, 1870, from that of a later Act, 11 U. S. Stat. at Large, 188, is of any importance in this connection, since both statutes refer to *dramatic compositions* and not to spectacular effects upon the stage.

¹ *Palmer v. De Witt*, 57 N. Y. 532; 2 Sweeny, 530. A professor of a university who delivers orally in his class-room lectures which are his own literary composition does not communicate such lectures to the whole world, so as to entitle any one to republish them without the permission of the author. *Caird v. Sime*, L. R. 12 App. Cas. 326.

² In *Palmer v. Daly*, 47 N. Y. 532; 2 Sweeny, 530, the judge delivering the opinion at general term dissented from previous views on this question, and denied the right of a spectator who has carried away in his memory the words, arrangements, and stage directions of a drama to reproduce or publish the same. His views are thus expressed: "There can be no fixed rules determining when an author has surrendered his literary property. Printing

§ 862. **Abridgment — Compilation.** — From the nature of the case it is very difficult for one author to prepare an abridgment his composition, and giving it public circulation, would fix the period of surrender in such a case; but one reading of a manuscript lecture, or one performance of a manuscript play, would not; and if one does not, what greater number, can it be said, will? The value to the author, of a play or of a lecture, who derives emolument from its delivery or representation before public audiences, is not limited to one performance. It may extend to any greater number, and the hundredth performance may bring more ample returns than the first. So that it may be fairly assumed that it is not intended, in any case, to surrender property in a literary composition so long as the author of it retains it in manuscript, and uses it before the public for his private pecuniary benefit. Therefore I think that there can be no presumption against literary ownership arising from the mere frequency of performance. Such performances are not inconsistent with a continued proprietorship, but are wholly consistent with, and necessary to, the enjoyment of the property. But I am compelled to dissent from the opinions of the learned judges in those cases, so far as it is intimated that a spectator may, upon witnessing the public performance of a play, rightfully commit it to memory, and then publish it to the world; and also from a qualified view of the same character, entertained by the learned late chief justice of this court, as expressed in his opinion in *Keene v. Clarke*. It seems to me that any surreptitious procuring of the literary property of another, no matter how obtained, if it was unauthorized and without the knowledge or consent of the owner, and obtained before publication by him, is an invasion of his proprietary rights, if the property so obtained is made use of to his injury. Each of the learned justices admits that a play cannot lawfully be taken down by a shorthand writer from the lips of the actors during a public performance. If taken thus by a stenographer, is it different, in its legal effect and resulting consequences, from committing to memory and afterwards writing it out? In principle it is not. They are only different modes of doing the same thing, and if without the author's consent, are alike injurious to his interests. The objection is not to the committing a play to memory, for over that no court can exercise any control, but in using the memory afterwards as the means of depriving the owner of his property. Such use, it seems to me, is as much an infringement of the author's common law right of property, as if his manuscript had been feloniously taken from his possession. I can see no difference. Upon a careful consideration, therefore, of the subject, I have not been able to appreciate the distinction which the learned judges in *Keene v. Clarke*, and *Keene v. Wheatley*, and *Crowe v. Aiken* have attempted to draw between different modes of obtaining the contents of a manuscript play from its public performance. They are equally objectionable, and are merely different modes of depriving an author of his literary property; and therefore any mode which effectuates that purpose is unlawful. The vice-chancellor says in *Prince Albert v. Strange* (p. 689), *supra*, that as to property of a private nature, which the owner, without infringing on the right of any other, may and does retain in a state of privacy, a person who, without the owner's consent, express or implied, acquires a knowledge of, cannot lawfully avail himself of the knowledge so acquired to publish without his consent a description of the property. That opinion goes quite as far as is necessary to destroy the distinction alluded to." To same effect see *Roberts v. Meyers*, 23 Monthly L.

of another's work without an infringement, and there is a disposition on the part of courts to look upon abridgments with more or less suspicion, and to construe very strictly the right of reducing a copyrighted publication to a condensed form. Still the right to abridge legitimately is clearly recognized; but in order to relieve a party making an abridgment from amenability to an injunction for an infringement, there must be an actual and considerable condensation of matter used in the original publication.¹ It is not sufficient merely to omit certain parts of the original in order that the remainder may be presented within smaller compass.² There is also a clear distinction between a *bona fide* abridgment and a compilation. The latter, when unauthorized and made by taking copious extracts and arranging them upon the same or a similar plan as in the original, being an infringement and warranting an injunction; nor does it alter the case that portions of the so-called compilation consist of original matter, since an injunction may be granted against pirated portions of a book, leaving the infringer to separate the original matter at his own cost.³ Still there may be such a compilation as will entitle its owner to copyright and to equitable protection for the same. But a publication made up for the most part of matter taken from the work of another, without any more labor being bestowed than that necessary to arrange it into chapters and subdivisions, or in alphabetical order, will be enjoined as an infringement.⁴

Reg. 396; *Keene v. Kimball*, 23 L. Reg. 669. Again, in *French v. Connelly*, 1 N. Y. Weekly Dig. 196, the court said: "Learned judges have differed upon this latter question; but it would seem to better accord with justice and good morals that the carrying away in the memory, or in the stenographic notes of a spectator, of the contents of a play unauthorized by the owner, is an infringement of his proprietary rights. It is a surreptitious mode of procuring the literary property of another, and when done from motives of gain, at the expense of the owner, is not defensible."

¹ *Folsom v. Marsh*, 2 Story, 107.

² *Gyles v. Wilcox*, 2 Atk. 141; *Gray v. Russell*, 1 Story R. 11. Further as to what constitutes an original production or a legitimate compilation or abridgment, and what an infringement or piracy, see *Drone on Copyright*, 416, 417; *Farmer v. Calvert, etc. Co.*, 5 Chicago Leg. N. 1; *Folsom v. Marsh*, 2 Story (U. S.), 100; *Morris v. Wright*, L. R. 5 Ch. 279; *Blunt v. Patten*, 2 Paine (U. S.), 397; *Kelly v. Morris*, L. R. 1 Eq. 697; *Morris v. Ashbee*, L. R. 7 Eq. 34; *Kelly v. Hooker*, 1 Y. & C. (C. C.) 197; *Matthewson v. Stockdale*, 12 Ves. 270.

³ *Story's Ex'rs v. Holcombe*, 4 McLean, 306.

⁴ *Lewis v. Fullarton*, 2 Beav. 6; *Butterworth v. Robinson*, 5 Ves. 709.

§ 863. **Translations.** — The law as to a translator's title to copyright and to equitable protection for the same seems to be in a somewhat unsettled state in this country; nor has the question ever been directly passed upon. It has been held, however, that a translation into a foreign language is not such an infringement as will entitle an author to an injunction against a publication of the translated copy.¹ This decision has been seriously

¹ *Stowe v. Thomas*, 2 Wall. Jr. 547. In denying the relief the court said: "An author may be said to be the creator, or inventor, both of the ideas contained in his book and the combination of words to represent them. Before publication he has the exclusive possession of his invention. His dominion is perfect. But when he has published his book and given his thoughts, sentiments, knowledge, or discoveries to the world, he can have no longer an exclusive possession of them. Such an appropriation becomes impossible, and it is inconsistent with the object of publication. The author's conceptions have become the common property of his readers, who cannot be deprived of the use of them, or their right to communicate them to others clothed in their own language, by lecture or by treatise. The claim of literary property, therefore, after publication, cannot be in the ideas, sentiments, or the creations of the imagination of the poet or novelist, as dissevered from the language, idiom, style, or outward semblance and exhibition of them. His exclusive property in the creation of his mind cannot be vested in the author as abstractions, but only in the concrete form which he has given them, and the language in which he has clothed them. When he has sold his book, the only property which he reserves to himself, or which the law gives to him, is the exclusive right to multiply the copies of that particular combination of characters which exhibits to the eyes of another the ideas intended to be conveyed. This is what the law terms copy, or copyright. See Curtis on Copyright, 9, 10, 11, etc. . . . The notion that a translation is a piracy of the original composition is founded on the analogy assumed between copyright and patents for inventions, and where the infringing machine is only a change of the form or proportions of the original, while it embodies the principles or essence of the invention. But as the author's exclusive property in a literary composition, or his copyright, consists only in a right to multiply copies of his books and to enjoy the profits therefrom, and not in an exclusive right to his conceptions and inventions, which may be termed the essence of his composition, the argument from the supposed analogy is fallacious. Hence in questions of infringement of copyright, the inquiry is not whether the defendant has used the thoughts, conceptions, information, or discoveries promulgated by the original, but whether his composition may be considered a new work requiring invention, learning, and judgment, or only a mere transcript of the whole or parts of the original, with merely colorable variations. Hence, also, the many cases to be found in the reports, which decide that a *bona fide* abridgment of a book is not an infringement of copyright. To make a good translation of a work often requires more learning, talent, and judgment than was required to write the original. Many can transfer from one language to another, but few can translate. To call a translation of an author's ideas and conceptions into another language a copy of his book would be an abuse of terms, an arbitrary judicial legislation."

questioned and vigorously attacked;¹ but the reasoning of the justice who delivered the opinion would be difficult to refute. The protection of the copyright laws also extends to translations of foreign plays into English; and a piracy of a translation into the English from a foreign language of a dramatic composition will be enjoined.²

§ 864. **Law Reports Result of Individual Enterprise protected.** — In England the reports of judicial decisions are made by individuals as private enterprises, the government neither superintending nor bearing the expense of the same; consequently, it seems to be well settled there that a reporter who prepares and publishes reports of judicial decisions may obtain a copyright thereon and be protected by injunction against infringement.³ And the protective powers of a court of equity have been extended to publishers of legal periodicals; and where plaintiff and defendant are the proprietors, respectively, of two rival legal publications which have been copyrighted, and contain from time to time reports of adjudged cases prepared by members of the bar under contract with the proprietors, one of such publishers may have the other enjoined from printing or selling any copy of the journal containing reports made and published in the other.⁴ In this country the protection of the copyright laws is confined to matter prepared by reporters, which is of an original character, such as *syllabi* of decisions or arrangements of arguments made by counsel, and foot-notes consisting largely of original composition. To this extent the courts have long recognized the right of a reporter of judicial decisions to copyright as in the case of other literary property.⁵

¹ See Drone on Copyright, 454; High on Inj. 1016.

² Shook v. Rankin, 6 Biss. 477.

³ Sweet v. Shaw, 1 Jur. 917; Sweet v. Maugham, 11 Sim. 51. See also Butterworth v. Robinson, 5 Ves. 709; Little v. Hall, 18 How. (U. S.) 165; Backus v. Gould, 7 How. (U. S.) 798; Paige v. Banks, 13 Wall. (U. S.) 608; Chase v. Sanborn, 6 Pat. Off. Gaz. (U. S.) 932; Banks v. McDivitt, 13 Blatch. (U. S.) 163; Farmer v. Calvert, L. E. & M. P. Co., 5 Chicago Legal News, 1; Blunt v. Patten, 2 Paine (U. S.), 397; Matthewson v. Stockdale, 12 Ves. 270.

⁴ Sweet v. Maugham, 11 Sim. 51.

⁵ Callaghan v. Myers, 128 U. S. 617; see also Little v. Hall, 18 How. 165; Backus v. Gould, 7 How. 798; Paige v. Banks, 13 Wall. 608, affirming s. c. 7 Blatch. 152; Chase v. Sanborn, 6 Pat. Office Gaz. 932; Banks v. McDivitt, 13 Blatch. 163.

§ 865. **Opinions of Judges and Official Reports not protected.** — But the right only extends to the marginal notes and the arguments of counsel as prepared and arranged by the reporter, and not to the opinions delivered by the court. In these no one can acquire an exclusive right of publication.¹ And a reporter occupying the position of a public officer and paid by the state or federal government for his labor, occupies a similar relation with respect to the matter prepared by him as do judicial officers; and it is clear that there can be no copyright in the head-notes in cases prepared by the judges themselves, and that no relief can be obtained.² But although the opinions of judges delivered by them in the discharge of their official duties are common property, and not subject to copyright unless in the name and for the benefit of the government whose employees such judges are, yet it is held that where under statutory authority a contract has been entered into between a publisher and the proper state officers, whereby the former is to have the exclusive benefit of copyright in the notes and other matters susceptible of copyright pertaining to the reports of judicial decisions in the state, other publishers will be enjoined from infringing the right so contracted for and secured; and the case is not altered by the fact that the copyright has been taken in the name of the state.³ A court calendar published as the result of private enterprise stands upon a different footing from official reports of court proceedings; and being a proper subject for copyright its piracy will be restrained.⁴

§ 866. **Newspapers — Periodicals.** — Though the provisions of the copyright laws of the United States expressly include every species of original publication, and expressly mention newspapers and other periodicals, yet for these the right to obtain copyright is of but little value, and in practice is seldom resorted to. It is somewhat different in England, where likewise newspapers are within the copyright act.⁵ Under that act an

¹ *Wheaten v. Peters*, 8 Pet. 591.

² *Chase v. Sanborn*, 6 Pat. Off. Gazette, 932.

³ *Little v. Gould*, 2 Blatch. 165.

⁴ *Longman v. Winchester*, 16 Ves. 269.

⁵ 5 & 6 Vict. c. 45. This act requires registration under that act in order to give the proprietor the copyright in its contents, and so enable him to sue in respect of a piracy; also, that to enable the proprietor of a newspaper to sue in respect of a piracy of any article therein, he must show, not merely that the

injunction was granted to three plaintiffs, the proprietors of three several publications, to restrain the infringement of their joint copyright in matter printed in all three publications, though the pirated matter was copied, not from either of the three publications, but from a reproduction of the same matter issued in another form by the authority of one of the plaintiffs without further registration under the copyright act.¹

§ 867. **Directory — Almanac.** — Courts of equity have frequently exercised their protecting powers to restrain infringing reproductions of city directories; and a subsequent compiler of such a publication when copyrighted will be restrained from using a former one otherwise than legitimately for purposes of reference. A servile imitation will be restrained, and where defendant has not availed himself of the common sources of information in preparing his directory, but has resorted to plaintiff's production in the main without original investigation or comparison, he will be enjoined from proceeding, such use of a copyrighted production being not legitimate but piratical.² And the reproduction is none the less piratical, and a proper subject for injunction, by reason of the fact that in plaintiff's directory certain persons have paid to have their names printed in full-faced or raised letters, thus giving such parts the character of advertisements. Thus, making such names more conspicuous than others does not render them or the directory in which they appear common property, or sanction their being copied in a later directory.³ On the same principle, a publisher and proprietor of a directory may enjoin the compilation of an almanac, although but a small portion is taken, if the matter taken constitutes the principal part of the almanac, and notwithstanding that the pirated portion consists of information concerning the post office obtainable by any person applying to the same source

author of the article has been paid for his services, but that it has been composed on the terms that the copyright therein shall belong to such proprietor. *Walter v. Howe*, 17 Ch. Div. 708.

¹ *Cate v. Devon & Exeter, etc. Co.*, L. R. 40 Ch. Div. 500. See also *Cox v. Land & Water Journal Co.*, L. R. 9 Eq. 324. But there is no copyright in descriptive advertisements and illustrated guides. *Cobbett v. Woodward*, L. R. 14 Eq. 407.

² *Kelly v. Morris*, L. R. 1 Eq. 697; *Morris v. Ashbee*, L. R. 7 Eq. 34; *Matthewson v. Stockdale*, 12 Ves. 270.

³ *Morris v. Ashbee*, L. R. 7 Eq. 34.

of information.¹ But the employment by a subsequent compiler of a directory of a previous publication as a guide to the source of information required in the preparation of a subsequent directory is not an infringement; and where it was shown that for the purpose of preparing a subsequent directory slips were cut from plaintiff's directory by the defendant to enable the latter to find persons from whom information could be obtained, these facts were held not to warrant an injunction.²

§ 868. **Maps and Charts — Guide-book.** — It is often difficult to determine what is a proper use of the results of prior labor in the same field, in the case of such productions as cannot possibly be entirely original. For instance, in the case of maps and charts, the originals are necessarily open to all, and copyright in these can only be violated by a servile imitation or an outright reproduction. Hence it is proper for the producer of a subsequent map to make use of preceding works upon the same subject, and to use the same for purposes of revision and comparison, it only being required that he bestow upon the materials mental labor, and that the alterations be not merely colorable.³ And

¹ Kelly v. Hooper, 1 Y. & C. (C. C.) 197.

² Morris v. Wright, L. R. 5 Ch. 279. That the injunction to restrain the infringement of one directory by another is limited to the extent to which they are identical, see List. Pub. Co. v. Keller, 30 F. 772.

³ In Farmer v. Calvert, L. E. & M. P. Co., 5 Chicago Legal News, 1, the court said: "The difficulty is greatest in cases of maps, and the like, in which there is not, and cannot be, any originality in the facts or materials of which they are composed, and which facts and materials are equally open to all. The following rule laid down by Mr. Copinger (Copinger's Law of Copyright, 91), comes as near to defining this right as anything I have been able to find or can invent. He says: 'The rule appears now to be settled that a compiler of a work in which absolute originality is of necessity excluded, is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labor upon what he has taken, and subjects it to such revision and correction, as to produce an original result; provided, that he does not deny the use made of such preceding works, and the alterations are not merely colorable.' To apply this rule to the present case: What mental labor did the defendant bestow upon those portions of the complainant's map admitted to have been taken in the preparation of its own, viz., the boundaries of the larger townships of Wisconsin? None whatever beyond the mere technical operation of reducing them from the larger scale of complainant's to the smaller scale of defendant's map. Neither does it appear that there was any revision whatever to ascertain if there were errors which needed correction, or for any other purpose. There is in fact nothing whatever to bring the case within the rule. So far as those boundaries are concerned it is clearly a case of naked piracy. But it is contended

where application was made by the plaintiff for an order *pendente lite* restraining the defendant from circulating a guide-book containing matter infringing upon the copyright of the plaintiff, the court considered that the question of the damage that might be sustained by the defendant upon granting the order, as compared to that of the plaintiff by denying it, and the financial ability of the defendant to respond to any damages assessed against him, and the fact that there was no intent on the part of the defendant to appropriate the property of the plaintiff, and that it was done without the knowledge of the defendant by one employed to compile the work, were all considerations which it was proper for the court to weigh in determining the question of granting or denying the application.¹

§ 869. **Paintings.** — Although a distinction is taken between a painting and a print, a copyright of the former will protect its owner in the sale of copies, although they may appropriately be called prints, and others will be restrained from copying copies of them for sale; nor does the publishing lithographic copies of a copyrighted painting deprive the owner of the copyright of the benefit of an injunction to restrain others from copying the lithographic copies.² And when a painting on public exhibition for private emolument was seen by spectators, some of whom, from recollection, arranged themselves in tableau representing

that boundaries of townships are not a legitimate subject of copyright, — that they are fixed and defined by statute law, and that the marking of them down upon paper is but a transcription in another form of the legal enactment. What is claimed in this regard is true in regard to all original materials from which maps are made, and that is that none of them are subjects of copyright — they are open to all. But no one has the right to avail himself of the enterprise, labor, and expense of another in the ascertainment of those materials, and the combining and arrangement of them, and the representing them on paper. The defendant no doubt had the right to go to the common source of information, and having ascertained those boundaries, to have drawn them upon its map, notwithstanding that in this respect it would have been precisely like complainant's map (which of course it would have been if they were both correct). But he has no right to avail himself of this very labor on the part of complainant in order to avoid it himself. As appears by complainant's affidavit, these boundaries were fixed by the boards of supervisors of the respective counties, and not by legislative enactment, thus showing that the labor must have been much greater than it would have been if such boundaries could have been ascertained from the statutes of the state." See also *Blount v. Pat-ten*, 2 Paine, 897.

¹ *Hanson v. Jaccard Jewelry Co.*, 82 F. 202.

² *Schumacker v. Schwencke*, 30 Fed. R. 690.

the figures in the painting and were photographed, the sale of engravings made from such photographs was restrained by injunction.¹

§ 870. **Mechanical Contrivance not covered by Copyright.** — The exclusive right of an author in his publications is in character purely incorporeal, and therefore distinct from all mechanical contrivances employed in connection with their publication. Accordingly, where a plate on which a map has been printed is sold on execution, the purchaser at the sale does not acquire a right to continue taking impressions of the copyrighted maps from the plate and selling them; and the owner of the copyright may, notwithstanding such sale and transfer of property in the plate, enjoin the purchaser from selling maps made from it.² So where a workman employed to take impressions from copper-plates of etchings made by the plaintiff, not intended for publication, took impressions for himself and sold them to the defendant, it was held an infringement of the plaintiff's proprietary right, and an injunction was granted and the impressions ordered to be destroyed.³

§ 871. **Violation of Contracts connected with Copyright.** — The jurisdiction to protect the rights of authors in their productions is not confined to the bare legal title covered by copyright, but the violation of covenants not to publish, or to publish upon certain terms and none others, may be restrained.⁴ And the question of the violation of copyright may arise out of a contract between a contributor to a publication and the publisher. And the proprietor of an encyclopædia, who employs a person to write an article for publication in that work, cannot, without the writer's consent, publish the article in a separate form, or otherwise than in the encyclopædia, unless the article was written on the terms that the copyright therein should belong to the proprietor of the encyclopædia for all purposes.⁵

¹ *Turner v. Robinson*, 10 Irish Ch. 121.

² *Stevens v. Gladding*, 17 How. 447.

³ *Prince Albert v. Strange*, 2 De G. & Sm. 652.

⁴ *Barfield v. Nicholson*, 2 Sim. & St. 1; *Ward v. Beeton*, Law Rep. 19 Eq. 207; *Colburn v. Simms*, 2 Hare, 543; *Morris v. Colman*, 18 Ves. 437; *Warne v. Routledge*, 18 Eq. 497; *Brooke v. Chitty*, 2 Coop. (temp. Cottenham) 216; *Colburn v. Simms*, 2 Hare, 543. See also *Kimberly v. Jennings*, 6 Sim. 340; *Lumley v. Wagner*, 5 De G. M. & G. 604; *Baldwin v. Society for Diffusion of Useful Knowledge*, 9 Sim. 393; *Montague v. Flockton*, L. R. 16 Eq. 189; 38 N. Y. 158; *Kemble v. Kean*, 6 Sim. 333.

⁵ *Bishop of Hereford v. Griffin*, 16 Sim. 190.

§ 872. **Same — Between Authors and Publishers.** — Applications for preventive relief sometimes arise collaterally to contractual relations between authors and publishers. The question of granting or refusing relief in such cases necessarily turns on the terms of the contract and the construction given them. Unless the right of publication of a copyrighted work conferred upon the publisher is exclusive by the terms of the contract, the author will not be restrained from publishing other and independent editions of the same work, especially where he has borne the entire expense of that made under the contract.¹ A question may arise between an author and a publisher as to how far the former may in the preparation of another work than that whose exclusive publication is authorized, but on a different subject, use a portion of the material already used. There are no decisions on the subject, but it is presumed that the same principles would apply as in case of any other infringement of a copyright, especially where the publisher instead of contracting for the exclusive publication makes an outright purchase of an author's manuscript and copyright. But where plaintiff had purchased defendant's copyright of a work upon criminal law, written by him and the defendant at the same time, contracted not to edit or write any other work on that subject, the court refused to enjoin simply because an advertisement had appeared announcing that he was about to edit another work bearing a different title from the first, but which might include some of the same subjects. The refusal to enjoin was based upon the ground that the defendant could not be deprived of the liberty to write what he pleased prior to an actual violation of the agreement by such a printing and publishing as constituted an infringement.² And an injunction was refused where it appeared that plaintiff had contracted with defendant, an authoress, to copyright and publish her work, to use his best efforts to secure

¹ *Warne v. Routledge*, L. R. 18 Eq. 497. See also *Pulte v. Derby*, 5 McLean, 328. As to relative rights of authors and publishers under contracts between them and violations of such contracts by assignment, see *Stevens v. Benning*, 6 De G. M. & G. 223. See also *Reade v. Bentley*, 8 Kay & Johnson, 278; s. c. 4 Kay & J. 656; *Jerrold v. Heywood*, 18 W. R. 279; *Pike v. Nicholas*, Id. 321; *Taylor v. Pillow*, L. R. 7 Eq. 418; *Paige v. Banks*, 7 Blatch. 152; s. c. 13 Wall. 608; *Saltus v. Bedford Co.*, (N. Y. App.) 31 N. E. 518.

² *Brooke v. Chitty*, 2 Coop. (temp. Cottenham) 216.

a speedy sale, and to pay her a percentage upon sales; that she undertook to furnish the manuscript, and agreed not to cause to be published anything which might injure the sale of the book; that plaintiff was seeking to restrain the publication of the same work, emanating from her since, in a newspaper; that the sale of the book had quite or nearly ceased, and that plaintiff had not continued his efforts to sell.¹

§ 873. **Diligence in seeking Relief—Complainant's Acquiescence.**—There is a strong tendency of judicial decisions to the effect that mere delay in asserting the right is not a bar to relief.² At any rate laches in order to constitute a bar to relief by injunction must be with knowledge. A plaintiff cannot be prejudiced by delay while ignorant of piracy.³ But it is scarcely necessary to state that a complainant may, by consenting to the publication of an alleged piratical publication, bar himself of relief in equity by injunction.⁴ And an injunction was refused to restrain alleged infringement of copyright, before trial at law, where the conduct of the plaintiffs had been such as, in the opinion of the court, was calculated to induce the defendants to

¹ *Worthington v. Batty*, 40 F. 479.

² See *Maxwell v. Somerton*, 30 L. T. n. s. 11; *Greene v. Bishop*, 1 Cliff. (U. S.) 186, 202; *Hogg v. Scott*, Law Rep. 18 Eq. 444; *Morris v. Ashbee*, Law Rep. 7 Eq. 34; *Strahan v. Graham*, 17 L. T. n. s. 457; *Boucicault v. Wood*, 2 Biss. (U. S.) 34; s. c. 7 Am. Law Reg. n. s. 539, 550.

³ *Greene v. Bishop*, 1 Cliff. 186, 202; *Lewis v. Fullarton*, 2 Beav. 6; *Boucicault v. Wood*, 2 Biss. (U. S.) 34; s. c. 7 Am. Law Reg. n. s. 539; *Chappell v. Sheard*, 1 Jur. n. s. 997. On a motion to restrain the performance of a play, being a dramatization of a work by defendant C., which had been dramatized and produced by the other defendants, it appeared that, plaintiff having suggested to C. that his work could be successfully dramatized, the latter wrote him: "That would be nice, but I could not dramatize it. But you could do it, and if you will take one half or two thirds of the proceeds, I wish you would. Sha'n't I send you the book?" Plaintiff replied: "I should be well pleased to undertake the dramatization. Shall be glad if you will send me a copy of the book," etc. Subsequently plaintiff read or gave C. a portion of the work, and, as he claimed, was directed to complete it. This was denied, but it was not suggested that plaintiff was told to abandon the work. *Held*, that the correspondence showed a contract definite and certain, and one which could be specifically performed by C., and that, it appearing that the other defendants had notice of plaintiff's rights, the motion would be granted. *House v. Clemens*, 9 N. Y. S. 484; 24 Abb. N. C. 381.

⁴ See *Rundell v. Murray*, Jac. 311; *Saunders v. Smith*, 3 Myl. & Cr. 711; *Strahan v. Graham*, 17 L. T. n. s. 457; *Latour v. Bland*, 2 Stark. 382; *Heine v. Appleton*, 4 Blatch. (U. S.) 125.

believe that the course taken by them would not be objected to by the plaintiffs.¹

The rule that plaintiff must come into court with clean hands applies in these cases; and it is clearly a proper application of this rule to refuse the relief where the book which plaintiff seeks to have protected by injunction is itself a piracy.²

§ 874. **Previous Establishment of Right at Law no longer required.** — It is now well settled that both the right and the infringement may be set up and adjudicated in a court of equity without having been first determined at law.³ And if a clear case of infringement be shown, a temporary injunction will be granted without proof of actual damage.⁴ Originally, courts of chancery in England were reluctant to grant relief prior to the establishment of the legal right in a court of law, and would refuse to interfere unless the right was clear and undisputed.⁵ Afterwards, by statute,⁶ and still later under the judicature acts,⁷ the chancery and law divisions of the high court of justice have concurrent and equal jurisdiction; so that now in England as well as in the United States, courts of equity have jurisdiction to determine all the questions, both legal and equitable, affecting the validity of copyrights and alleged infringements.⁸ Sometimes, even prior to these English statutes, a preliminary injunction was granted upon condition that complainant proceed

¹ *Saunders v. Smith*, 3 Myl. & Cr. 711. When the publication alleged to be an infringement was a spelling-book containing alterations and improvements from former books of the same class, and the defendant had been allowed to proceed with its publication for two years without objection, an injunction was refused and complainant left to his legal remedies. *Assignees v. Wilkins*, 8 Ves. 224, n.

² *Carey v. Fadden*, 5 Ves. 24.

³ *Farmer v. Calvert Lith., etc. Co.*, 1 Flipp. (U. S.) 228. See also *Stevens v. Gladding*, 17 How. (U. S.) 447.

⁴ *Reed v. Halliday*, 19 F. 325.

⁵ *Lowndes v. Duncombe*, 2 Coop. (temp. Cottenham) 216; *M'Neill v. Williams*, 11 Jur. 844; *Saunders v. Smith*, 3 Myl. & Cr. 787; *Rundell v. Murray*, Jac. 811; *Southey v. Sherwood*, 2 Meriv. 485; *Wolcott v. Walker*, 7 Ves. 1; *Bramwell v. Halcomb*, 3 Myl. & Cr. 787.

⁶ 25 & 26 Vict. c. 42, § 1.

⁷ 36 & 37 Vict. c. 66; 38 & 39 Vict. c. 77; 39 & 40 Vict. c. 59; 40 & 41 Vict. c. 9, 57.

⁸ See *Barker v. Taylor*, 2 Blatch. (U. S.) 82; *Lawrence v. Dana*, 2 Am. L. T. n. s. 608; *Farmer v. Calvert, L. E. & M. P. Co.*, 5 Am. L. T. R. 168; *Atwill v. Ferrett*, 2 Blatch (U. S.) 39; *Pierpont v. Fowle*, 2 Woodb. & M. (U. S.) 23.

to establish his title by action at law, the injunction to be continued or withdrawn according to the success or failure of the action to establish title.¹ But in all cases, compliance with the statutes on the subject of securing and perfecting copyright to a book or other production is a condition precedent to the right to an injunction for its protection.²

§ 875. **What considered in granting and refusing Relief.** — A case of invasion of copyright being made out, whether by wholesale appropriation, or by servile imitation, or by colorable translation or abridgment, the court will not refuse an injunction because it would have the effect of stopping the sale of a work, parts of which are original or even meritorious. If the parts which are original cannot be separated from those wherein the infringement is found without destroying the use and value of the original matter, the alleged appropriator must suffer the consequences of his own wrongdoing. The same rule applies here as in the case of confusion of materials. He that mixes what belongs to him with that which does not, if unable to separate the ingredients of the mixture, must bear all the resulting loss.³ But the court will not usually grant an injunction where only a small part of a publication has been copied, and the piracy is slight, unless special injury is shown.⁴ Nor will the court as a rule grant an injunction where the matter taken is of a character capable of being reproduced by a mere mental process which any person of ordinary educational qualifications may perform; such, for example, as arithmetical calculations or computations of interest.⁵ Especially will relief be refused in such cases if complainant is chargeable with laches in asserting his rights.

¹ *Mawman v. Tegg*, 2 Russ. 385; *Dickens v. Lee*, 8 Jur. 183; *Sweet v. Shaw*, 3 Jur. 217; *Bacon v. Jones*, 4 Myl. & Cr. 433; *Wilkins v. Aiken*, 17 Ves. 422; *Bogue v. Houlston*, 5 De G. & Sm. 267.

² § 4956, Rev. St. 1874; *Jollie v. Jacques*, 1 Blatch. (U. S.) 618; *Parkinson v. Laselle*, 3 Sawy. (U. S.) 330; *Wheaton v. Peters*, 8 Pet. (U. S.) 591; *Chase v. Sanborn*, 6 Pat. Off. Gaz. (U. S.) 932; *Baker v. Taylor*, 2 Blatch. (U. S.) 23; *Struve v. Schwedler*, 4 Blatch. (U. S.) 23.

³ *Mawman v. Tegg*, 2 Russ. 390, 391; see also *Jerrold v. Houlston*, 3 Kay & J. 708. Compare *Emerson v. Davies*, 3 Story R. 768.

⁴ *Sweet v. Carter*, 11 Sim. 572, 580; *Campbell v. Scott*, 11 Sim. 81; *Bell v. Whitehead*, 3 Jur. 68; *Jerrold v. Heywood*, 18 W. R. 279; *Bohn v. Bogue*, 10 Jur. 420; *Lewis v. Fullarton*, 2 Beav. 6; *Webb v. Powers*, 2 Woodb. & M. (U. S.) 497; *Greene v. Bishop*, 1 Cliff. (U. S.) 186.

⁵ *Bailey v. Taylor*, 1 Russ. & M. 73; *King v. Reed*, 8 Ves. 223, n.

§ 876. **Relative Injury and Inconvenience.** — In determining the propriety of granting or refusing an injunction and giving other relief, the court will consider the nature and objects of the defendant in taking the matter from plaintiff's work, the quantity and value of the material used, and the extent to which such use may prejudice the sale or diminish the profits or supersede the objects of the producer of the original.¹ Accordingly, where application was made for an injunction to restrain the circulation of a guide-book containing matter infringing upon plaintiff's rights in a copyrighted work, it was held that the question of damages that might be sustained by the defendant by granting the order, as compared with that to the plaintiff by denying it, and the financial ability of the defendant to respond to any damages assessed against him, and the fact that there was no intention on the part of the defendant to appropriate the property of the plaintiff, and that it was done without the knowledge of the defendant, by one employed to compile the work, were all considerations which it was proper for the court to weigh in determining the question of granting or denying the application.² And it may be stated as a general principle governing herein, that where the injury is slight, or the granting the injunction would for any reason do injustice to defendant, it will be refused and plaintiff left to his legal remedies.³

¹ *Folsom v. Marsh*, 2 Story (U. S.), 100; *Farmer v. Calvert*, L. E. & M. P. Co., 5 Chicago Leg. N. (Ill.) 1.

² *Hanson v. Jaccard Jewelry Co.*, 32 Fed. Rep. 202.

³ *Webb v. Powers*, 2 Woodb. & M. 497; *Greene v. Bishop*, 1 Cliff. (U. S.) 186.

CHAPTER XIX.

AGAINST UNAUTHORIZED AND INJURIOUS PUBLICATIONS GENERALLY.

- I. PROTECTION OF LITERARY PROPERTY AS DISTINCT FROM COPYRIGHT.
 II. LIBELLOUS PRINTS.

I. PROTECTION OF LITERARY PROPERTY AS DISTINCT FROM
 COPYRIGHT.

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| § 877. Common Law and Statutory Right distinguished.
878. Concurrent Jurisdiction in State and Federal Courts.
879. Statutory Recognition of Common Law Right.
880. Common Law Right in Dramatic Compositions.
881. Assignees and Licensees protected. | § 882. Title under <i>nom de plume</i> protected.
883. Paintings, Etchings, etc.
883 a. Exhibition of Statuary — Publication of Photograph.
884. Depositary restrained.
885. Publication by Author or Purchaser terminates Right.
885 a. Rights of Authorship not infringed by Injunction. |
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§ 877. Common Law and Statutory Right distinguished. — In analogy to the protection of copyrights, a jurisdiction has become well established by modern decisions to restrain the invasion or piracy of literary property in the product of the intellect which still remains in the form of manuscript, or which, if printed, has not been published, and for which no statutory copyright has been obtained, and to restrain a similar right which an artist has in his pictures and other works of his creative art. The jurisdiction of courts of equity to protect the rights of parties in and to unpublished manuscripts, whether the same be intended for future publication in book form or in periodicals, or whether the same consist in correspondence commonly designated as private writings, rests upon other grounds than the legal right secured by copyright under the laws of Congress. The right to such protection was recognized at common law, and courts of equity, in giving it, exercise common law jurisdiction possessed by them independent of statute. Statutes on the subject, where such statutes exist, are mere declarations of common law principles long established and defined. Courts of equity

restrain the unauthorized publication of unpublished manuscripts upon similar grounds of irreparable mischief, the inadequacy of legal remedies or the prevention of multiplicity of suits as in other cases.¹

§ 878. **Concurrent Jurisdiction in State and Federal Courts.** — This jurisdiction is exercised by state courts. But the jurisdiction of state courts to protect common law rights in literary compositions is not exclusive. In proper cases and under proper conditions as to residence and citizenship, the federal courts have jurisdiction in these as in other cases.² The right and property of an author or composer of any work, whether of literature, art, or science, in such work, unpublished, and kept for his private use or pleasure, entitles the owner to withhold the same altogether, or so far as he may please, from the knowledge of others; and the court will interfere to prevent the invasion of this right by the publication of a catalogue containing a description of such work.³

§ 879. **Statutory Recognition of Common Law Right.** — The common law right of property in manuscript is now recognized by a

¹ Story's Eq. Jur. 943. The basis of an author's property right in literary, scientific, and professional treatises in manuscript, is obvious, and the author must be deemed to possess the original ownership and to be entitled to appropriate them to such uses as he shall please. *Id.* "Nor can he," continues Mr. Story, "justly be deemed to intend to part with that ownership by depositing them in the possession of a third person, or by allowing a third person to take and hold a copy of them. Such acts must be deemed strictly limited in point of right, use, and effect, to the very occasions expressed or implied, and ought not to be construed as a general gift or authority for any purposes of profit or publication to which the receiver may choose to devote them. The property, then, in such manuscripts, not having been parted with in cases of this sort, if any attempt is made to publish them without the consent of the author or proprietor, it is obvious that he ought to be entitled to protection in equity. See *Prince Albert v. Strange*, 1 Mac. & Gord. 25; 1 Hall & Twells, 1. An author of letters or papers of whatever kind, whether they be letters of business, or private letters, or literary compositions, has a property and an exclusive right therein, unless he unequivocally dedicate them to the public, or to some private person; and no person has any right to publish them without his consent, unless such publication be required to establish a personal right or claim, or to vindicate character. *Folsom v. Marsh*, 2 Story, 100; *Grigsby v. Breckenridge*, 2 Bush (Ky.), 480. Accordingly injunctions are freely granted against such unauthorized publications. *Eden on Injunct.* ch. 13, pp. 275, 276; *Duke of Queensbury v. Shebbeare*, 2 Eden, 329; *Southey v. Sherwood*, 2 Meriv. 434, 436; *Macklin v. Richardson*, Ambl. 694; *Pope v. Curl*, 2 Atk. 343.

² *Keene v. Wheatley*, 9 Am. Law Reg. 33; *Crowe v. Aiken*, 2 Biss. 208. See also *Goldmark v. Kreling*, 11 Sawy. 215; s. c. 25 Fed. Rep. 349.

³ *Seeley v. Fisher*, 11 Sim. 581.

United States statute.¹ This statute applies to dramatic composition as well as to other literary productions; and an injunction was granted by a United States court to prevent the printing and publication by a defendant of a considerable portion of complainant's manuscript play.²

§ 880. **Common Law Right in Dramatic Compositions.** — Where protection for the common law property right in a dramatic composition is sought, jurisdiction to afford relief is exercised by state courts as effectively as in the federal courts under the copyright law; and the alienage of an author of a dramatic composition is no bar to relief against a violation of his property interest therein, which will be protected even in the hands of an assignee. Whatever rights the plaintiff has in the drama which is the subject of a controversy, may exist at common law, independent of any statute either of the state or of the United States. The protection he seeks is of property, and a right of property which is well established and recognized wherever the common law prevails, and not of a franchise or privilege conferred by statute. The state courts have jurisdiction as in other actions affecting common law rights or property interests.³ Written alterations in the manuscript of a play are the property of the owner of the manuscript; and while unwritten addi-

¹ § 4967, R. S., provides that "every person who shall print or publish any manuscript whatever, without the consent of the author or proprietor first obtained, if such author or proprietor is a citizen of the United States, or resident therein, shall be liable to the author or proprietor for all damages occasioned by such injury."

² *Boucicault v. Hart*, 13 Blatch. 47.

³ *Palmer v. De Witt*, 47 N. Y. 532; s. c. 3 Alb. L. J. 54. In this case the court says: "Until published the work is the private property of the author, wherever the common law rights of authors are regarded. When once published, with the assent of the author, it becomes the property of the world, subject only to such rights as the author may have secured under copyright laws, and they can have no force nor give any rights beyond the territorial limits of the government by which they are enacted. The rights of assignees domiciled there, of alien authors resident abroad, have been sustained by the courts of this country, and no distinction has been made between transfers of literary property and property of any other description. The alienage of the author is no obstacle to him or his assignee in proceeding in our courts for a violation of his rights of property in his unpublished works." Further, with respect to uncopyrighted productions, such as theatrical compositions and the like, see *Keene v. Wheatley*, 9 Am. Law Reg. n. s. 33; *Southey v. Sherwood*, 2 Meriv. 435; *Prince Albert v. Strange*, 1 Mac. & G. 25; *Queensbury v. Shebbeare*, 2 Eden, 329; *Pope v. Curl*, 2 Atk. 342; *Grigsby v. Brackenridge*, 2 Bush (Ky.), 480; *Story's Eq.* § 943.

tions are not the property of such owner, it is held that their use by the proprietor of another theatre to which they have been communicated by an actor will be enjoined.¹

§ 881. **Assignees and Licensees protected.** — The assignees of an author's property interest in a dramatic composition will be protected. This right of property he can transfer, and a court of equity will protect him or his assignee, in a proper case, just as it will the owner of any other species of property.² And it is unimportant with respect to the right of a purchaser of a dramatic composition to have its infringement by a reproduction enjoined, that the defendant against whom relief is sought is acting in good faith and supposes that he is himself the owner of the manuscript.³

A similar principle as that governing for the protection of assignees applies in the case of one licensed to perform a dramatized play, and the latter can maintain a suit for the protection of his common law property therein; and where he has an exclusive license for a definite period, and by the terms of his license is to bring all suits for the protection of his rights, the general owner is not a proper party to the action.⁴ And even a part owner may protect his property by action against an infringer.⁵

§ 882. **Title under nom de plume protected.** — An author is entitled to protection with respect to matter written by him under an assumed name.⁶ And a publisher who selects a *nom de plume*, and procures an author to write under it, acquires a property therein which will be protected by injunction against a third party publishing fiction under the same pseudonym.⁷ But an author cannot acquire any more rights under an assumed name than he would have under his own name, nor can he acquire protection for his writings under a pseudonym, however ingenious, novel, or quaint, which will entitle him to protection of it as a trade-mark so as to have its reproduction restrained after publication of the manuscript without a copyright.⁸

¹ Keene v. Wheatley, 4 Phila. (Pa.) 157.

² Crowe v. Aiken, 2 Biss. 208.

³ Shook v. Daly, 49 How. Pr. 366.

⁴ Aronson v. Fleckenstein, 28 Fed. Rep. 75.

⁵ Ibid.

⁶ Clemens v. Belford, 14 Fed. Rep. 728.

⁷ Munroe v. Tousey, 13 N. Y. S. 79.

⁸ Clemens v. Belford, 14 Fed. Rep. 728.

§ 883. **Paintings, Etchings, etc.** — An artist who produces a painting has a common law right of property therein which entitles him to protection by injunction against unauthorized copying and reproductions of the original for purposes of sale; and neither the fact that the owner has previously consented to the publication in a magazine of an engraving taken from the original, nor that he has placed the painting on exhibition in a public gallery for the purpose of securing subscriptions, amount to such a publication as will deprive him of the benefit of an injunction.¹ But it was held that the exhibition of a large diorama copied from plaintiff's engraving did not warrant an injunction, especially where plaintiff's right had not been established at law.² But one who has made etchings and drawings is not precluded of his right to enjoin unauthorized publications by the fact that he has taken impressions from the same for his own private use, not intending to make publication; and when in such case defendants have obtained copies surreptitiously and catalogued them for sale, an injunction will lie to restrain the unauthorized publication and sale, even though plaintiff has not previously established his right at law.³

§ 883 *a*. **Exhibition of Statuary and Publication of Photograph.** — A court of equity, at the instance of one of the relatives of a deceased person, will not enjoin the making and placing on public exhibition of a statue of the decedent by unauthorized persons, which plaintiff and all other relatives unite in alleging will cause them pain and distress, and will be considered by them a disgrace; unless such is shown to have been the result.⁴ But unauthorized publication of photographs are freely prevented.⁵

¹ *Turner v. Robinson*, 10 Ir. Ch. 121. *Exhibition of statue of deceased private person.* — A preliminary injunction to restrain the making and public exhibition of a statue of a deceased person will be continued where it is not shown that she was a public character. *Schuyler v. Curtis*, (Sup.) 15 N. Y. S. 787.

² *Martin v. Wright*, 6 Sim. 297.

³ *Albert v. Strange*, 1 Mac. & G. 25. See also *Pollard v. Photographic Co.*, 40 Ch. D. 345.

⁴ *Schuyler v. Curtis*, 42 N. E. 22; 147 N. Y. 434.

⁵ *Marks v. Jaffa*, (Super. N. Y.) 26 N. Y. S. 908; 6 Misc. Rep. 290, holding that injunction will lie against the publication of a picture of plaintiff in defendant's newspaper, with an invitation to readers of the paper to vote on the question of the popularity of plaintiff as compared with another person,

§ 884. **Depositary restrained.** — The court will interfere by injunction to prevent a party availing himself in any manner of a title arising out of a violation of right or breach of contract or confidence. The cases in which the court refuses to interfere by injunction until the legal right is established at law have no application to cases in which the court exercises an original and independent jurisdiction to prevent a wrong arising from a violation of right or breach of contract or confidence.¹ Where the plaintiff had contracted to correct and complete, from materials to be furnished by the defendant, a book which the defendant expressed his intention to write, and agreed also to supply the legal information connected with the subject, for which the plaintiff was to be paid a certain remuneration, according to the number of pages the work would contain, the court refused an injunction to restrain the defendant from printing, publishing, or selling the legal part of the work (which the plaintiff had contributed) without any material alteration or omission, and also refused an injunction to restrain the defendant from printing, selling and publishing the work until he had paid the plaintiff the sum agreed upon for his assistance and contribution; for such payment may be enforced at law, and title to it is not a ground for the interposition of a court of equity.²

§ 885. **Publication by Author or Purchaser terminates Right.** — By publication at common law, an author dedicates his literary work whose picture is also published in such paper. But injunction will not be granted to prevent the publication of the photograph of one who is among the foremost inventors of his time, and is a "public character." *Corliss v. E. W. Walker Co.*, (C. C.) 64 F. 280. Use of picture of deceased person on cigar brand not enjoined, though he was not a public character. *Atkinson v. John E. Doherty & Co.*, (Mich.) 80 N. W. 285.

¹ *Albert v. Strange*, 1 Mac. & G. 25. In *Duke of Queensbury v. Shebbeare*, 2 Eden, 329, the court, on a bill by the representatives of the Earl Clarendon, granted an injunction to restrain the printing of an unpublished MS., viz., his "History of the Reign of Charles the Second," a copy of which had been by the representative of the author given to a person under whom the defendant claimed, but not with the intention that he should publish it.

² *Cox v. Cox*, 11 Hare, 118. R. applied for an injunction against a stereotyper to prevent his selling the books printed by him from advanced sheets furnished him by R. of a work written by one T. R. alleged that "the sheets were sent to him for the advantage of the said T." and of himself. *Held*, that this statement was too vague to be made the foundation of an injunction, on the ground of protecting T.'s rights. *Redfield v. Middleton*, 7 Bosw. (N. Y.) 649.

product to the public; and he can afterwards have no protection with respect to the matter so dedicated.¹ But the unauthorized publication or other use of lectures which have been delivered, but not published otherwise than by delivery to audiences, may be enjoined.² Nor is the representation of a play upon the stage publication.³ And the publication of a play or a representation acquired by phonographic reports or other surreptitious means is such an infringement on the rights of the owner as will entitle him to an injunction.⁴ And actors will be restrained from reproducing a play in another theatre for the benefit of others than their employer in whose employ they have memorized it with a view of acting it for his exclusive benefit.⁵

§ 885 *a*. **Rights of Authorship not infringed by Injunction.** — It is seen by what precedes that the courts are solicitous to encourage and protect literary production; and a court of equity has no jurisdiction of a suit to restrain a party from publishing a biography of complainant, or of a member of complainant's family.⁶

II. LIBELLOUS PRINTS.

§ 886. General View.

887. Use of Author's Name without Authority.

§ 888. Unauthorized Publication by Depository — Trust Relation.

§ 886. **General View.** — As a rule, courts of equity decline to enjoin libellous, immoral, and indecent publications merely because they are such, deeming the legal remedies by civil action for damages and criminal prosecutions adequate to afford relief

¹ *Bartlett v. Crittenden*, 5 McLean (U. S.), 32; *Boucicault v. Wood*, 2 Biss. (U. S.) 34; *Keene v. Wheatley*, 4 Phila. (Pa.) 157; *Tompkins v. Halleck*, 133 Mass. 32; *Carte v. Duff*, 25 Fed. Rep. 183; *Parton v. Prang*, 3 Cliff. (U. S.) 537.

² *Keene v. Kimball*, 16 Gray (Mass.), 545.

³ *Boucicault v. Hart*, 13 Blatch. (U. S.) 47; *Tompkins v. Halleck*, 133 Mass. 32; *Roberts v. Myers*, 28 Monthly Law Rep. 396; *Palmer v. De Witt*, 47 N. Y. 552; s. c. 7 Am. Rep. 480; *Crowe v. Aiken*, 2 Biss. (U. S.) 208; *Keene v. Kimball*, 28 Monthly Law Rep. 660; *Shook v. Rankin*, 6 Biss. (U. S.) 477; *Boucicault v. Fox*, 5 Blatch. (U. S.) 87.

⁴ *Crowe v. Aiken*, 2 Biss. (U. S.) 208; *Shook v. Daly*, 49 How. Pr. (N. Y.) 366; *Macklin v. Richardson*, Ambl. 694; *French v. Maguire*, 55 How. Pr. (N. Y.) 471; *Keene v. Wheatley*, 4 Phila. (Pa.) 157; s. c. 9 Am. Law Reg. 33.

⁵ *Shook v. Rankin*, 3 Cent. L. J. 210.

⁶ *Corliss v. E. W. Walker Co.*, (C. C.) 57 F. 434.

and remedies.¹ But a distinction has sometimes been taken between those that are libellous, indecent, or immoral, in a general sense as tending to shock the sensibilities and injure the character, and those which tend to injure one in the enjoyment and use of his property, rendering it less valuable, or to destroy one's standing or credit in his trade or business. In the latter class of cases courts of equity have in a few instances, basing jurisdiction upon the protection of property rights and the inadequacy of legal remedies, granted relief.² It was broadly

¹ See *Southey v. Sherwood*, 2 Meriv. 435; *Murray v. Benbow*, 6 Peters' Abr. 558; *Gee v. Pritchard*, 2 Swanst. 413; *Wolcott v. Walker*, 7 Ves. 1; *Seeley v. Fisher*, 11 Sim. 581; *Hime v. Dale*, 2 Camp. 27; *Clark v. Freeman*, 11 Beav. 112; *Bradreth v. Lance*, 8 Paige (N. Y.), 486; *Lawrence v. Smith*, Jac. 471; *State v. Civil District Judge*, 34 La. An. 741; *Shook v. Daly*, 49 How. Pr. (N. Y.) 368; *Life Association of America v. Boogher*, 3 Mo. App. 173; *Martinette v. Maguire*, 1 Deady (U. S.), 216; *Boston Diatite Co. v. Florence Manuf. Co.*, 114 Mass. 69; *Whitehead v. Kitson*, 119 Mass. 484; *De Wick v. Dobson*, 46 N. Y. S. 890; 18 App. Div. 399; *Predigested Food Co. v. McNeal*, (Super. Ct. Cin.) 1 Ohio N. P. 266; *Chicago City Ry. Co. v. General Electric Co.*, 74 Ill. App. 465; *Lee v. Gibbings*, 67 Law T. N. S. 263; *Reyes v. Middleton*, (Fla.) 17 So. 937; *Rothschild v. Brunswick-Balke-Collender Co.*, 12 Ohio Cir. Ct. R. 741. An injunction does not lie to restrain a manufacturer of goods from issuing circulars to dealers in such goods, charging that plaintiff is offering for sale imitations of the goods, and threatening prosecution therefor. *Mauger v. Dick*, 55 How. (N. Y.) Pr. 132.

² *Springhead Spinning Company v. Riley*, L. R. 6 Eq. 551. In this case it appeared that the defendants, who were officers of a trades-union, gave notice to workmen, by means of placards and advertisements, that they were not to hire themselves to the plaintiffs pending a dispute between the union and the plaintiffs. The bill prayed an injunction to restrain the issuing of the placards and advertisements, alleging that by means thereof the defendants had, in fact, intimidated and prevented workmen from hiring themselves to the plaintiffs, and that the plaintiffs were thereby prevented from continuing their business, and the value of their property was seriously injured and materially diminished. It was held, upon demurrer, that the acts of the defendants, as alleged by the bill, amounted to crime, and that the court would interfere by injunction to restrain such acts, inasmuch as they also tended to the destruction or deterioration of property. But where proprietors of a newspaper dissolved partnership, and one of them agreed to purchase the whole, and before the completion, and pending a suit for specific performance, the purchaser published statements as to the profits and losses of the paper, in order to establish a company to carry it on, a motion for an injunction to restrain him was refused. *Marshall v. Watson*, 25 Beav. 501. *Advertising under name of another.* — Where the owner of a publication claims an injunction to restrain the issue of another publication with a similar name, he must show not only that the assumption of the name by the defendant is calculated to deceive the public, but also that there is a probability of the plaintiff being injured by such deception. *Borthwick v. Evening Post*, L. R. 37 Ch. Div. 449. See also *Hayward & Company, v. Hayward & Sons*, L. R. 34 Ch. Div. 198.

stated in one case that the court has jurisdiction to restrain the publication of any document tending to the destruction of property, whether consisting of money or of professional reputation by which property is acquired. And according to this view the publication of a notice stating that the plaintiff was a partner in a bankrupt firm was restrained.¹ And equity will enjoin the publication of a libel, where the legality of a patent is collateral to the relief sought. But the wrong and the irreparable nature of the injury must be clearly shown.² Jurisdiction to restrain publications injurious to tradesmen is now held to be conferred by statute in England upon courts of equity powers.³ English courts also have jurisdiction to restrain a person from making

¹ *Dixon v. Holden*, L. R. 7 Eq. 488.

² *Bell v. Singer Manuf. Co.*, 65 Ga. 452. In a previous case in the same state the rule that, where there is no infringement of a property right equity will not enjoin a threatened libel, was applied in an injunction suit to prevent an untrue publication that another's than the complainant's sewing machine drew a premium at the fair of a state agricultural society. *Singer Mfg. Co. v. Domestic Sewing Machine Co.*, 49 Ga. 70. Only in case of threatened repetition can equity enjoin slander of title to a patent. *Palmer v. Travers*, 20 Fed. Rep. 501. In England it is held, that since there is no presumption in law in favor of the validity of a patent, a patentee is not entitled to publish statements of his intention to institute legal proceedings, in order to deter persons from purchasing alleged infringements of his patent, if he has no *bona fide* intention to follow up his threats by taking such proceedings, and the court will in such case restrain him from making such publication. *Rollins v. Hinks*, L. R. 13 Eq. 355. See *Westinghouse A. B. Co. v. Carpenter*, 32 F. 545; *Flint v. Hutchinson Smoke Burner Co.*, (Mo.) 19 S. W. 804.

ISSUE OF THREATENING CIRCULARS. — A court of equity has jurisdiction to restrain an attempted intimidation by one issuing circulars threatening to bring suits for infringements against persons dealing in a competitor's patented article, the bill charging, and the proof showing, that the charges of infringement were not made in good faith, but with malicious intent to injure complainant's business. *Emack v. Kane*, 34 F. 46.

³ *Thorley's Cattle Food Co. v. Massam*, L. R. 6 Ch. Div. 582. But in *Liverpool H. S. Association v. Smith*, L. R. 37 Ch. Div. 170, injunction to restrain the publication of future articles reflecting unfavorably on a company, refused on the ground of the difficulty of granting an injunction which would not include matters that might turn out not to be libellous; and because if the injunction was granted in terms to restrain what was libellous, the question of libel or no libel would have to be tried in a very unsatisfactory way on motion to commit. In order to obtain an injunction in such a case, it is sufficient for the plaintiff to show that the libel is calculated to injure his trade; it is not necessary that he should prove actual damage. The defendant in a civil action for libel has the same right to a trial by jury as the defendant in any other civil action; he has no higher right. *Thomas v. Williams*, L. R. 14 Ch. Div. 763, 864.

slandorous statements calculated to injure the business of another person, and this jurisdiction extends to oral as well as written statements, though it requires to be exercised with great caution as regards oral statement.¹ It was held in a recent case in this country, in the absence of a statute, that when from the nature of the case, as where many persons are engaged in circulating the same libellous publication for the purpose of bringing a merchant or other business man into disrepute and driving away his customers, so that if any redress could be had at all it could only be obtained by numerous suits against a great number of defendants, a case is presented which justifies a departure from the rule of non-interference to prevent libels. Accordingly it was held that equity will enjoin the publication and circulation of hand-bills, circulars, etc., printed and circulated in pursuance of a combination to boycott a newspaper;² and the jurisdiction in such cases is now well established by several recent decisions.³ But upon a bill in equity charging in effect

¹ In *Hermann Loog v. Bean*, L. R. 26 Ch. Div. 306-314; 53 L. J. Ch. 1128, the court said: "Here is a man who had been in the employ of the plaintiffs, making to their customers slanderous statements with regard to the business of the company, and trying to induce the customers not to pay the sums which they owe to the plaintiffs. The court has of late granted injunctions for libel, and why should it not also do so in cases of slander? It is clear that slanderous statements such as were made to old customers in this case must have a tendency materially to injure the plaintiffs' business; they are slanders, therefore, spoken against their trade. It is not necessary, therefore, in my opinion, to show that loss has actually been incurred in consequence of them. If they are calculated to do injury to the trade the plaintiffs may clearly come to the court. There is, no doubt, more difficulty in granting an injunction as regards spoken words than as regards written statements, because it is difficult to ascertain exactly what is said. But when the defendant is proved to have made certain definite statements, such as are mentioned in the order, in my opinion an injunction is properly granted to prevent his repeating them. The defendant, though no doubt the tongue is an unruly member to govern, must take care that he keeps his tongue in order, and does not allow it to repeat those statements which he is by the injunction restricted from uttering." For injunction against exhibition of statue, see *Schuyler v. Curtis*, 147 N. Y. 434; 42 N. E. 22.

² *Casey v. Cincinnati, etc. Typ. Un.*, 45 F. 135. To maintain a bill for injunction restraining publication of advertisements, etc., injurious to plaintiff's business, the plaintiff must allege and prove not only that the advertisements are false, but also that the defendant is actuated by malice in making or threatening the publication. If defendant is publishing the advertisements in good faith for the purpose of advancing his own sales, and upon a reasonable belief of their truth, the plaintiff is not entitled to the extraordinary remedy of injunction. *Celluloid Manufacturing Co. v. Goodyear Dental Vulcanite Co.*, 13 Blatch. 375.

³ *Lewin v. Welsbach Light Co.*, (C. C.) 81 F. 904; *Collard v. Marshall*,

that defendants had confederated together to prevent plaintiff's pilot-boat from getting business, denying his right of using it as such, and alleging that they had published wrong statements concerning him, it was held that equity would not interfere, the remedy at law being adequate.¹ Nor is it within the jurisdiction of equity to restrain by injunction, representations or publications by a mercantile agency, as to the character and standing of the plaintiff or as to his property, although such representations may be false, if there is no breach of trust or of contract involved. The vindication of the plaintiff's alleged rights is properly the subject of an action at law.²

§ 887. **Use of Author's Name without Authority.** — The publication of a book as that of another when in fact it is not such constitutes such an injury as entitles such other person to an injunction, although the misrepresentation does not amount to the infringement of a copyright.³ And the case is not altered by the fact that the representation is true in part, if the public are likely to be misled to plaintiff's injury.⁴

§ 888. **Unauthorized Publication by Depositary — Trust Relation.** — The property in and the right to retain letters remains in the person to whom they are sent; but the sender has still that kind of interest, if not property, in the letters which enables him to restrain their publication, unless it can be clearly shown that such publication is necessary for the vindication of character.⁵ Chancery has jurisdiction to restrain publication of private correspondence only on the ground of property, either in the composition where it is valuable as a literary production or in the paper in which the letters are written; and it will not interfere

[1892] 1 Ch. 571; *Beck v. Railway Teamsters' Protective Union*, (Mich.) 77 N. W. 13; 42 L. R. A. 407; *Grand Rapids School Furniture Co. v. Haney School Furniture Co.*, (Mich.) 52 N. W. 1009; 92 Mich. 558; *Smith v. Smoke Burner Co.*, 110 Mo. 492.

¹ *Francis v. Glynn*, 118 U. S. 385.

² *Raymond v. Russell*, 143 Mass. 295; 9 N. E. 544. An association incorporated to protect dealers from giving credit to delinquent debtors will not be enjoined from publishing to the members of the association plaintiff's name as such a debtor, pending his action for libel, unless he shows that the charge is false. *Green v. United States Dealers', etc. Assoc., etc.*, 16 Abb. (N. Y.) N. Cas. 419; s. c. 39 Hun (N. Y.), 300.

³ *Lord Byron v. Johnston*, 2 Meriv. 29.

⁴ *Harte v. Dewitt*, 1 Centr. L. J. 360. Compare *Seeley v. Fisher*, 11 Sim. 581.

⁵ *Lytton v. Devey*, 54 L. J. Ch. 293.

merely to prevent an injury to the feelings of the parties.¹ Justice Story has distinguished between private letters addressed to ordinary individuals, which it is generally considered cannot be published without the consent of the senders, and official letters addressed to the government as the heads of its departments by officers, which upon principles of public policy may be published or withheld as circumstances may require.²

The court will not restrain one of several partners in a patent from publishing a book containing an account of the invention.³ But the publication of facts contrary to agreement was restrained, although occasioned by a very small difference in money arrangements.⁴ And an injunction may be granted to restrain a subscriber from communicating information that has been transmitted to said subscriber by a news agency upon the terms that the subscriber shall not communicate it to third persons, and also to restrain third persons from inducing a subscriber to break his contract.⁵

¹ *Wetmore v. Scovell*, 3 Edw. (N. Y.) 515; *Hoyt v. McKenzie*, 3 Barb. (N. Y.) Ch. 820. The general limitation upon courts in their interference in these cases is well stated in Mackeldey's Comp. Mod. Civ. L., p. 123, where it is said: "As a general rule, the line of demarcation betwixt law and ethics must be strictly observed, and internal actions must not be made the objects of law. This doctrine was fully recognized by the Romans; whence the maxim *interna non curat prætor*. When this fundamental distinction is violated, a door is opened at once to the most injurious and arbitrary invasions of the rights of individuals by the ruling power; and, in general, wherever the judicial power is allowed to encroach too far on the widely extended domain of moral duties, it is in danger of becoming inconsistent and unjust."

² *Folsom v. Marsh*, 2 Story R. 100-113; Story's Eq. Jur. 947. An injunction granted to restrain the printing of an unpublished MS., a copy of which had been by the representative of the author given to a person under whom the defendant claimed, but not with the intention that he should publish it. *Duke of Queensbury v. Shebbeare*, 2 Eden, 329.

³ *Hawkins v. Blatchford*, 1 L. J. (Ch.) 142.

⁴ *Anon.*, 3 Jur. N. S. 685. A plaintiff by his bill prayed an injunction to restrain the defendant from falsely representing that the latter was carrying on business in succession to or in connection with him; the bill averred general acts of misrepresentation, but one case only was made out in which the defendant had opened a letter addressed to the plaintiff, answered it in his own name, and endeavored to obtain the custom which that letter offered to the plaintiff. *Held*, that though this raised a grave suspicion against the defendant, it was not sufficient in a suit framed as was this to entitle the plaintiff to an injunction. *Edgington v. Edgington*, 11 L. T. N. S. 299.

⁵ *Exchange Tel. Co. v. Central News (Eng.)*, [1897] 2 Ch. 48.

CHAPTER XX.

PROTECTION OF INTERESTS IN TRADE-MARKS AND TRADE NAMES.

- I. ESSENTIAL ELEMENTS OF COMPLAINANT'S TITLE TO RELIEF.
II. ACTS ENJOINED AS INFRINGEMENTS.

I. ESSENTIAL ELEMENTS OF COMPLAINANT'S TITLE TO RELIEF.

<p>§ 889. Nature of the Right. 890. Statutory Provisions. 891. Basis of Jurisdiction. 892. Further as to what entitled to Protection as a Trade-mark. 893. Names of Articles and Generic Terms not protected. 894. Form of Product and Style of Workmanship not protected. 895. Name as Trade-mark. 896. Fraudulent Use of one's Own Name. 897. Names of Newspapers and Periodicals.</p>	<p>§ 898. Trade Name. 899. Name of Locality. 900. Street Number. 901. Combinations of Letters of Alphabet. 902. Designs adopted by Trades-unions. 903. Complainant's Title. 904. Doubt as to Title, or Nature of Injury. 905. No Relief where Alleged Trade-mark itself a Fraud on Public. 906. Diligence in seeking Relief.</p>
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§ 889. **Nature of the Right.** — Analogous to the jurisdiction for the protection of franchises, patents, and copyrights, is that exercised to prevent persons from imitating sign-words and symbolical devices adopted and used by a tradesman or manufacturer to distinguish his goods and wares from others in the market. While the property which a party possesses in a trade-mark is of an exclusive character, yet the right is no more exclusive than that which he holds in other property; nor does the legal right, as in the case of patents and copyrights, necessarily depend upon an exercise of mental faculties or compliance with statutory requirements to give it force and effect. The right of protection in the ownership of a trade-mark is recognized at common law, though this common law right has been given statutory expression in England and in several states. But whether the principle be referable to the common law or found embodied in statutory form, it may be stated generally

that one who produces or deals in a particular thing, or conducts a particular business, may appropriate to his exclusive use as a trade-mark any form, symbol, or name which has not been so appropriated by another, to designate the origin or ownership thereof, but he cannot exclusively appropriate any designation, or part of a designation, which relates only to the name, quality, or the description of the thing or business, or the place where the thing is produced or the business is carried on.¹

And to protect this right from infringement when fairly established and legal remedies are shown to be inadequate is one of the important uses of injunction.²

§ 890. **Statutory Provisions.** — There is no power conferred upon Congress by the federal constitution to legislate on the subject of trade-marks. Consequently the importance of statutory enactments on the subject by several states has greatly increased since the act of Congress regarding them passed in 1870 was declared unconstitutional and void.³ But the common law rights of a tradesman using a trade-mark are not affected

¹ See Civil Code Cal. § 991. See *Hygeia Water Ice Co. v. New York Hygeia Ice Co.*, 19 N. Y. S. 602.

² See *Pierce v. Guittard*, 68 Cal. 68; *Funke v. Dreyfus*, 34 La. An. 80; s. c. 44 Am. Rep. 413; *Plant Seed Co. v. Michel Plant Seed Co.*, 23 Mo. App. 579; *Williams v. Books*, 50 Conn. 278; s. c. 47 Am. Rep. 642; *New Haven Patent Rolling Spring Bed Co. v. Farren*, 51 Conn. 324; *Bradley v. Norton*, 33 Conn. 157; *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215; s. c. 52 Am. Rep. 811. The right to trade-marks, and the remedies for their protection, exist independently of statutory regulations; and therefore the fact that Act Cong. March 3, 1881, § 3, fails to enumerate descriptive words in the list of limitations on the right to the registry of trade-mark, does not by implication validate a trade-mark consisting of such words. *L. H. Harris Drug Co. v. Stucky*, 46 F. 624. General provisions enacted regulating and protecting the use of brands, earmarks, trade-marks on stock, packages, merchandise, etc.: North Dakota Act, March 9, 1891 (Laws 1891, c. 40, p. 119); Washington Act, Feb. 21, 1891 (Laws 1891, c. 16, p. 29); Indiana Act, March 6, 1891 (Laws 1891, c. 116, p. 317). Manufacturers or dealers in mineral water, beer, etc., in bottles, boxes, etc., protected in the use of names, trade-marks, etc., thereon: Alabama Act, Feb. 14, 1891 (Acts 1890-91, No. 319, p. 700); California Act, March 31, 1891 (St. 1891, c. 154, p. 217); Maine Act, March 31, 1891 (Pub. Laws, 1891, c. 125, p. 136). Associations and unions of workingmen protected in their use of labels, trade-marks, and forms of advertising: Kansas Act, March 11, 1891 (Laws 1891, c. 213, p. 363); Illinois Act, May 8, 1891 (Laws 1891, p. 202); Maine Act, March 28, 1891 (Pub. Laws 1891, c. 114, p. 124); Nebraska Act, March 31, 1891 (Laws 1891, c. 15, p. 214); Wisconsin Act, April 16, 1891 (Laws 1891, c. 280, p. 353); Kentucky Act, April 16, 1890 (Pub. Acts 1889-90, c. 823, p. 99); Ohio Act, April 2, 1890 (Laws 1890, p. 141).

³ Trade Mark Cases, 100 U. S. 82.

by the registration of the trade-mark; so that, if he has acquired a right to a trade-mark as to a certain class of goods, and the trade-mark as registered is confined to a part of that class of goods, he will be entitled to protection for that whole class of goods.¹

§ 891. **Basis of Jurisdiction.** — The broadest ground of equitable jurisdiction in such cases is the protection of a property interest and the prevention of fraud, the court giving effect to the principle that no one is permitted to appropriate the pecuniary benefits of another's reputation.² A complainant has a valuable interest in the good-will of his trade or business, and having adopted a particular label, sign, or trade-mark, indicating to his customers that the articles bearing it are made or sold by him or by his authority, or that he carries on business at a particular place, he is entitled to protection against one who attempts to deprive him of his trade or customers by using his labels, signs, or trade-mark, without his knowledge.³ "Every one," says the supreme court of the United States, "is at liberty to affix to a product of his own manufacture any symbol or device, not previously appropriated, which will distinguish it from articles of the same general nature manufactured or sold by others, and thus secure to himself the benefits of increased sale by reason of any peculiar excellence he may have given to it. The symbol or device thus becomes a sign to the public of the origin of the goods to which it is attached, and an assurance that they are the genuine articles of the original producer. In this way it often proves to be of great value to the manufacturer in preventing the substitution and sale of an inferior and different article for his products. It becomes his trade-mark, and the court will protect him in its exclusive use, either by the imposition of damages for its wrongful appropriation, or by restraining others from applying it to their goods, and compelling them to account for profits on a sale of goods marked with it."⁴

¹ *Jay v. Ladler*, L. R. 10 Ch. Div. 649.

² 2 Morgan's Law of Literature, 252.

³ Note to § 991, Deering's An. Civ. Code Cal.; *McLean v. Fleming*, 96 U. S. 252; *Wamsutta Mills v. Fox*, 49 F. 141; *Coats v. Holbrook*, 2 Sandf. Ch. 586; *Partridge v. Menck*, 2 Barb. Ch. 101; *Cuervo v. Jacob Henckell Co.*, 50 F. 471.

⁴ *Manufacturing Co. v. Trainer*, 101 U. S. 51, 53; *Jordan v. O'Connor*,

§ 892. **Further as to what entitled to Protection as a Trade-mark.** — Necessarily the most important duty of courts in this class of cases is the ascertainment and definition of rights, since, when it is once determined that a party has acquired the right to use a particular design or combination as a trade-mark, an injunction usually follows, as a matter of course, to restrain its infringement. A trade-mark may consist of a name (under some circumstances), or any symbol, figure, letter, form, or device, if adopted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells, to distinguish the same from those manufactured or sold by another.¹ No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to legal protection.² Nor can any property be acquired in the words, device or devices used for the trade-mark in themselves, otherwise than in connection with the goods, wares, and properties of a certain kind and description.³ And while the name of an article of common use is not the subject of exclusive use as a trade-mark, yet the peculiar style of a package in which a dealer puts up the article,

(Super. N. Y.) 17 N. Y. S. 462; 27 Abb. N. C. 376. See also *Wolfe v. Barnett*, 24 La. An. 97; *Newman v. Alvord*, 15 N. Y. 189, 196; *Blackwell v. Wright*, 73 N. C. 310, 313; *Lee v. Haley*, L. R. 5 Ch. App. 155; *Croft v. Day*, 7 Beav. 88; *Hostetter v. Vowinkle*, 47 Barb. 455; *G. G. White Co. v. Miller*, 50 F. 277.

¹ *McLean v. Fleming*, 96 U. S. 254; *Upton on Trade-Marks*, 9; *Coddington's Digest*, 9; *Taylor v. Carpenter*, 2 Sandf. Ch. 603; *Newman v. Alvord*, 51 N. Y. 189.

² 2 *Morgan's Law of Literature*, 250; *St. Louis Piano Mfg. Co. v. Merkel*, 1 Mo. App. 305; *Candee v. Deere*, 54 Ill. 439.

³ *Canal Company v. Clarke*, 13 Wall. 311; *Manufacturing Company v. Trainer*, 101 U. S. 51, 54. A sign placed over a man's place of business, with a row of beer-barrels painted thereon, and the letters "P. B. P" and the words "Depot of the Celebrated Philadelphia Beer" thereon, cannot be protected as a trade-mark. *Eggers v. Hink*, 63 Cal. 445. Defendants will not be enjoined from using the symbol "R. 12" on their goods, which was used by plaintiff merely to show the size of the sheets in each package of stationery, and by defendants for the same purpose. *Marcus Ward & Co. v. Ward*, (Sup.) 15 N. Y. S. 913.

and the combination constituting the label, may be protected by injunction from imitation.¹

§ 893. **Names of Articles and Generic Terms not protected.** — It is well settled that no one can acquire such a right to adopt and use as a trade-mark a generic name, or a name merely descriptive of an article of trade, or of its qualities, ingredients, or characteristics, when not used in combination with some device or design, as will entitle him to have the same protected by injunction.² The general rule may be thus stated: In order to procure an injunction, first, an intent on the part of the defendant in using the imitation must be shown to injure the originator by disposing of the defendant's wares as his; secondly, if consisting of words, the trade-mark must indicate ownership and origin, not merely quality, kind, texture, composition, utility, intended use, or class of consumers. Names having a definite and established meaning not indicating ownership, origin, or something equivalent, cannot be exclusively appropriated. Thus,

¹ *Cook v. Starkweather*, 13 Abb. (N. Y.) Pr. n. s. 392; *Lea v. Wolf*, 13 Abb. Pr. (N. Y.) n. s. 389. See also *Enoch Morgan's Sons Co. v. Schwachofer*, 5 Abb. (N. Y.) N. Cas. 265. Compare *Enoch Morgan's Sons Co. v. Troxell*, 57 How. Pr. (N. Y.) 121. The fact that the article covered by the trade-mark is composed of well-known ingredients is no reason for refusing an injunction. *Williams v. Johnson*, 25 Bosw. (N. Y.) 1. See *Comstock v. White*, 18 How. (N. Y.) Pr. 421; s. c. 10 Abb. (N. Y.) Pr. 264; *Williams v. Spence*, 25 How. (N. Y.) Pr. 366.

² *Canal Co. v. Clark*, 13 Wall. 311; *Manufacturing Co. v. Trainer*, 101 U. S. 51, 54. Plaintiffs, manufacturing a compound which they termed "Bromo Caffeine," and claiming proprietary rights in the use of such name, sought to restrain the use by defendants of the same name applied to the same compound manufactured by defendants. Affidavits filed by plaintiffs and defendants left the question in doubt whether plaintiffs were the originators of the compound in question, whether the name in question was not a mere designation of the principal ingredients of such compound, and whether the dissimilarity of the bottles and labels used by defendants in putting up the compound was sufficient to prevent the public from buying their compound for that of plaintiffs. *Held*, that a preliminary injunction was properly denied. *Keasbey v. Brooklyn Chemical Works*, (Sup.) 16 N. Y. S. 318. *Name of line of business.* — The "Employers' Liability Assurance Corporation, Limited," of Great Britain, doing business in the state of New York, sought to restrain defendant, the "Employers' Liability Insurance Company of the United States," a junior company, from doing business in the same state, on account of similarity of name. *Held*, that a general injunction was properly refused, on the ground that the term "Employers' Liability" was descriptive of a well-known branch of insurance business. 10 N. Y. S. 845, reversed. *Employers' Liability Assurance Corporation v. Employers' Liability Insurance Co.*, (Sup.) 16 N. Y. S. 397.

it was held that the word "satinine" is a descriptive word, having reference to the character and quality of goods, such as starch, glue, perfumery, etc., to which it is applied, and that it is not an invented word, and therefore cannot be registered as a trade-mark under the English patents, designs, and trade-marks act;¹ and in another case that the words "indurated fibre," as applied to wares made of wood-pulp which has been condensed and subjected to baths in linseed oil and resin, and baked, designate wood fibre which has been subjected to a hardening process, and refer to ingredients, quality, and characteristics, and are not so arbitrary and fanciful as to authorize a preliminary injunction to protect them as a trade-mark.² So the use of the word "rose," in connection with the word "vanilla," as a trade-mark, is no ground for enjoining a rival maker of similar products containing those well-known flavors from using those words in describing his goods.³ The same conclusion was reached where the words "compressed yeast,"⁴ "club-house gin,"⁵ were each respectively sought to be protected as trade-marks. But the rule that a generic word cannot be so appropriated as to entitle one to protection in its use only applies when it designates the article in connection with which it is used. A generic or descriptive word having no necessary connection or reference to the ingredients or quantities of the wares upon which it is stamped, printed, or labelled, or to which it is otherwise attached, may as well form the whole or part of a trade-mark as any other class of words. Thus, the word "cream," used in connection with the word "baking powder," being shown to have been long used by a particular manufacturer and stamped upon his packages, was accorded protection as a trade-mark.⁶ And obviously the use of the name of the article upon which the label or device containing the trade-

¹ *In re Meyerstein's Trade-Mark*, 43 Ch. Div. 604.

² *Indurated Fibre Co. v. Amoskeag Indurated Fibre Ware Co.*, 37 F. 695.

³ *Clotworthy v. Schepp*, 42 F. 62. See also *Appeal of Laughman*, 128 Pa. St. 1; *Koehler v. Sanders*, 21 Abb. N. C. 95.

⁴ *Fleischman v. Newman*, 2 N. Y. S. 608.

⁵ *Corwin v. Daly*, 7 Bosw. 222. The words "Svenka Snusmagasinet," meaning "Swedish Snuff-store," being merely descriptive of the business there carried on, cannot constitute a trade name as against other Swedes engaged in the snuff business. Affirming 35 Ill. App. 551; *Bolander v. Peterson*, (Ill.) 26 N. E. 608.

⁶ *Price Baking-Powder Co. v. Fyfe*, 45 F. 799.

mark is placed may be used in connection with other words which are sufficiently fanciful for the purpose;¹ so it is held that the word "celluloid," being a new and arbitrary word coined by plaintiff, and applied to goods of its manufacture, is a valid trade-mark, in the use of which plaintiff is entitled to be protected, though the term has become so generally known as to have been adopted by the public as the common appellative of the article to which it is applied.²

§ 894. **Form of Product and Style of Workmanship not protected.** — This branch of equitable jurisdiction is based upon the protection of property interests; but the encouragement of a high degree of excellence in manufacturing, to be attained through skill, dexterity, and individual enterprise, the benefits of which are shared by the public as well as the proprietor of a trade-mark, is an important consideration for affording protection. But it is obvious that this policy would be defeated if there could be no reproduction or imitation of the mere results of skill and superior workmanship in the production of an article. Consequently, aside from the immunity secured under the patent laws, neither the mere form nor the ingredients, nor the perceptible results of skilful handicraft, can be given effect as a trade-mark. Thus, where plaintiff, the manufacturer of horse-shoe nails, coated them with bronze, with the sole purpose of making them popular, and this device was adopted by the defendant, who made a nail in imitation of plaintiff's nail, it was held that there was no trade-mark in the bronzed nail, and that a bill would not lie to restrain the manufacture by defendant of such nails.³

§ 895. **Name as Trade-mark.** — Not only will a system of numbers or words⁴ adopted and used by a manufacturer or dealer as a trade-mark be protected, but he will be protected in the use of

¹ *Priestley v. Adams*, 18 N. Y. S. 41, holding that the manufacturer of goods familiarly known to the trade by and sold under the manufacturer's name as "Priestley's Silk-Warp Henrietta," is entitled to an injunction against any person selling goods of an inferior quality under that name, with intent to deceive the public.

² *Celluloid Manuf. Co. v. Read*, (Cir. Ct.) 47 F. 712.

³ *Putnam Nail Co. v. Dulaney*, 21 A. 391; 27 W. N. C. 360, affirming 8 Pa. Co. Ct. R. 595.

⁴ System of numbering adopted by manufacturer to designate goods of his make protected as trade-mark; for instance, "303." *Gillott v. Esterbrook*, 48 N. Y. 374.

his own name for the purpose against all persons having a different name.¹ Thus, where a trade-mark, the use of which began in 1810, was relinquished by the owner in 1831 to his son, and at the son's death in 1862 an arrangement was made among his four children by which each should use the trade-mark, by placing their individual names thereon in place of their grandfather's, it was held an injunction to restrain the use of it by a stranger would be sustained.² But where the short address, "Street, London," was used for many years in sending telegrams from abroad to Street & Co., of Cornhill, and a bank adopted by arrangement with the post office the phrase "Street, London," as a cipher address for telegrams from abroad to themselves, it was held that the court had no jurisdiction to restrain the bank from using such cipher address.³ Where, however, both parties are manufacturers of liquid bluing, the defendant may be restrained from using, for the sale of the bluing manufactured by him, old bottles of the plaintiff having

¹ *Ainsworth v. Walmsley*, 1 L. R. Eq. 518; *Smail v. Sanders*, 20 N. E. 296; 118 Ind. 105; *Gilman v. Hunnewell*, 122 Mass. 139; *Sykes v. Sykes*, 3 Barn. & Cress. 541; *Burgess v. Burgess*, 3 De G. M. & G. 896; *Croft v. Day*, 7 Beav. 84; *Rogers v. Taintor*, 97 Mass. 291, 296; *Holloway v. Holloway*, 13 Beav. 209. Injunction will lie at the suit of a physician to restrain the unauthorized use of a fac-simile of his signature in advertising a medicine. *Mackenzie v. Soden Mineral Springs Co.*, (Sup.) 18 N. Y. S. 240; 27 Abb. N. C. 402. That name alone, unconnected with something more, cannot constitute a trade-mark. See *McLean v. Fleming*, 96 U. S. 252, citing *Millington v. Fox*, 3 Myl. & Cr. 338; *Maneely v. Maneely*, 62 N. Y. 427; *Dent v. Turpin*, 2 Johns. & H. 139. That party cannot have right in name as against another person of the same name unless defendant uses a form of stamp or label so like that used by plaintiff as to represent that the defendant's goods are of the plaintiff's manufacture. See *Gilman v. Hunnewell*, 122 Mass. 139; *Rogers v. Taintor*, 97 Mass. 291; *Colladay v. Baird*, 4 Phila. 139; *Croft v. Day*, 7 Beav. 89; *Burgess v. Burgess*, 3 De G. M. & G. 896; *Sykes v. Sykes*, 3 Barn. & Cress. 541; *McLean v. Fleming*, 96 U. S. 245, 252; *Holmes v. Holmes*, 37 Conn. 278; *Stonebreaker v. Stonebreaker*, 33 Md. 252; *Carmichael v. Latimer*, 11 R. I. 395; *Coats v. Platt*, 17 Leg. Inst. 213; s. c. 7 Pittsb. L. J. 861; *Meriden Britannia Co. v. Parker*, 39 Conn. 450; *Burke v. Cassin*, 45 Cal. 467. Name of place of business will be protected, as "No. 10 South Water Street." *Glen & Hall Mfg. Co. v. Hall*, 61 N. Y. 226. Proprietor of hotel protected in name of hotel. *Howard v. Henriques*, 3 Sandf. 725; *Kingsley v. Jacoby*, 20 N. Y. S. 46; 28 Abb. N. C. 451; *Woodward v. Lasar*, 21 Cal. 448. Name of theatre protected. *Booth v. Jarrett*, 52 How. Pr. 169. See also *El Modelo Cigar Mfg. Co. v. Gato*, 25 Fla. 886. The proprietary rights in names under which articles are manufactured, as analogous to trade-marks, considered by Grafton Dulany Cushing, 4 Harv. Law Rev. 321.

² Appeal of Pratt, (Pa.) 11 A. 878.

³ *Street v. Union Bank of Spain and England*, L. R. 30 Ch. Div. 156.

plaintiff's name upon them.¹ On the same principle an injunction was granted to restrain infringement of the name of an established line of steamers.² And a corporation stands upon the same footing with natural persons with respect to the right to protection in the use of its name as a trade-mark.³ But no one can, by using his own name as a trade-mark, debar others having the same name from using it legitimately in their business.⁴

§ 896. **Fraudulent Use of one's Own Name.** — An injunction will be granted to restrain a party from the use of his own name in connection with the name of an article, thus forming a combination trade-mark, as where defendant used his own name in his signs and advertisements, disguising and half concealing the initials so that the customers would easily mistake it for the plaintiff's, the surnames of the two being the same.⁵ But where a firm name falsely implied that the copartnership was a corporation, an injunction to restrain its infringement was refused.⁶ And it may be stated generally that one will not be restrained from the use of his own name unless used in such a way as to make it apparent that his purpose is deceptive, or is misleading the public and injuring the plaintiff.⁷ Especially should an

¹ *Sawyer Crystal Blue Co. v. Hubbard*, 32 F. 888; *Evans v. Van Laer*, 32 F. 153.

² *Winsor v. Clyde*, 9 Phila. (Pa.) 518.

³ *Amoskeag Manuf. Co. v. Garner*, 54 How. (N. Y.) Pr. 297. See also *Electro-Silicon Co. v. Levy*, 59 How. (N. Y.) Pr. 469; *Collins Co. v. Oliver, etc. Corp.*, 20 Blatchf. (U. S.) 542; *Humphreys Co. v. Wenz*, 14 Fed. Rep. 250; *Celluloid Manuf. Co. v. Cellonite Manuf. Co.*, 32 F. 94. *Company trading under identical name.* — There is nothing in the companies act, 1882, to affect the right of a company registered under a particular name to an injunction restraining another company which, notwithstanding the prohibition of section 20 against identity of names, has been registered under an identical or similar name, from carrying on its business under that name, if it is proved that that name is calculated to deceive, — the principles applicable to individuals trading under identical or similar names applying equally to companies. *Merchant Banking Co. of London v. Merchants' Joint Stock Bank*, L. R. 9 Ch. Div. 560.

⁴ *Maneely v. Maneely*, 62 N. Y. 427.

⁵ *Devlin v. Devlin*, 67 Barb. 290. See *England v. N. Y. Pub. Co.*, 8 Daly (N. Y.), 375. So where one Oakes sold the exclusive right to manufacture and sell "Oakes' Candies" he was enjoined from manufacturing and selling candies made by him as "Oakes' Candies." *Probasco v. Bouyon*, 1 Mo. App. 241.

⁶ *McNair v. Cleave*, 10 Phila. (Pa.) 155.

⁷ *Decker v. Decker*, 52 How. (N. Y.) Pr. 218; see also *Booth v. Jewett*, 52 How. Pr. 169. Complainant sold a medicine called "Brown's Iron Bitters,"

injunction be refused where sought against a party for using his own name when there is not identity but only a resemblance in the two names.¹

§ 897. **Names of Newspapers and Periodicals.** — The right of a proprietor of a newspaper to prevent another person from adopting the same or a similar name for a similar publication is founded on the right of property in the proprietor, and rests upon the equitable doctrine that the use of such name is reasonably calculated to mislead the public to believe that the newspaper is that of the original proprietor, and thus enable him to pass off his paper for that of the original proprietor.² A fair application of the principle upon which courts proceed in this class of cases is afforded in a case where plaintiffs were publishers of a pictorial journal called "Life," and for some time had been reproducing in book form some of its pictures and literary matter with the name of "The Good Things of Life." Defendants, who had been connected with plaintiffs in the reproduction, commenced to print a book similar in appearance and character, containing pictures and matter from another journal whose name was not given, calling it "The Spice of Life," by which people were deceived, thinking the matter was from plaintiff's journal. It was held that the defendants used the word "Life" not in its ordinary sense, but with intent to deceive people into the belief that the matter in "The Spice of Life" was from the journal "Life," and plaintiffs having estab-

compounded by one Brown, and the defendants subsequently sold a medicine called "Brown's Iron Tonic," prepared under a different formula by another Brown, who, *bona fide*, gave it his name, the bottles, wrappers, and labels of the defendants bearing no resemblance to those of the complainant; the medicine itself was distinguished from that manufactured by complainant, in the circulars issued by defendants. *Held*, that there was no infringement, and that the mere similarity in the two names was no ground for equitable interference. *Brown Chemical Co. v. Myer*, 31 F. 453.

¹ *Foster v. Webster Piano Co.*, 13 N. Y. S. 838. In this case the trademark of plaintiff, a piano manufacturer, was "Weber, New York." *Held*, that an injunction restraining defendant *pendente lite* from putting on its pianos the words "Webster, New York," was rightly refused, there being nothing to show any intention by defendant to sell its pianos as the pianos made by plaintiff, or that the use of the word "Webster" had deceived any one.

² *Walter v. Emmott*, 34 L. J. Ch. 1059. See also *Stephens v. De Conto*, 4 Abb. (N. Y.) Pr. n. s. 47; *Snowden v. Noah*, Hopk. (N. Y.) Ch. 347. See *Maxwell v. Hogg*, 2 L. R. Ch. App. 399.

lished the right to use the name "Life" as applicable to their reproduction, defendants should be enjoined from using it.¹

§ 898. **Trade Name.** — Analogous to the protection extended to one's name as forming part of, or in connection with the name of an article the whole of, a trade-mark, is that extended to restrain the unauthorized use of another's name to induce persons to purchase the goods and wares of the user under the belief that they are the product or property of the person whose name is used.² And where a person has an established business

¹ *Stokes v. Allen*, 2 N. Y. S. 648. See also *Estes v. Worthington*, 31 F. 154. *Additional illustrations.* — In 1891 plaintiff was the publisher of a newspaper styled "The Electrical World." In 1890 defendant published a newspaper devoted to the same subject called the "Electric Age." Plaintiff's titlepage consisted of the name of the paper, combined with designs of electrical appliances and structures printed in colors. In 1891 defendant changed the name of its paper to that of "The Electrical Age," and adopted a titlepage similar in general to that of plaintiff, but having points of striking diversity, and printed in and upon other and different colors. *Held*, that the facts shown were not sufficient to justify an injunction upon the ground that purchasers would be induced to purchase defendant's paper instead of plaintiff's by reason of their similarity of appearance. *W. J. Johnston Co. v. Electric Age Pub. Co.*, 14 N. Y. S. 803. The proprietor of an old-established paper called "The Mail," published three days a week at 11 A. M., at the price of 2d., in London, but whose principal circulation was in the provinces and abroad, was held not entitled, upon interlocutory application, to an injunction restraining the defendant from using on a daily morning paper which he had just started, and which was published in London at 8 A. M., at the price of ½d., the title of "The Morning Mail." *Walter v. Emmott*, 34 L. J. Ch. 1059.

² *Croft v. Day*, 7 Beav. 84; see also *James v. James*, L. R. 13 Eq. 421; *Landreth v. Landreth*, 22 Fed. Rep. 41. Compare *Marcus Ward & Co. v. Ward*, (Sup.) 15 N. Y. S. 913. In the first case cited an injunction was granted to restrain a relative of the senior member of the firm of Day & Martin, after the senior member's decease, from using the name of the original firm on packages of merchandise to the prejudice of the firm's successors in business. In deciding for complainant, Lord Langdale, M. R., said: "The accusation which is made against this defendant is this: that he is selling goods under forms and symbols of such a nature and character as will induce the public to believe that he is selling the goods which are manufactured at the manufactory which belonged to the testator in this cause. It has been very properly said that the principle in these cases is this: that no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person for the purpose of inducing the public to suppose either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest, that to do these things is to commit a fraud, and a very gross fraud. I stated, upon a former occasion, that, in my opinion, the

for his goods carried on under a given name or with a particular mark, it is a fraud on him for other persons to assume the same

right which any person may have to the protection of this court does not depend upon any exclusive right which he may be supposed to have to a particular name, though the person practising it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others. It is perfectly manifest that two things are required for the accomplishment of a fraud such as is here contemplated. First, there must be such a general resemblance of the forms, words, symbols, and accompaniments, as to mislead the public. And secondly, a sufficient distinctive individuality must be preserved, so as to procure for the person himself the benefit of that deception which the general resemblance is calculated to produce. To have a copy of the thing would not do; for, though it might mislead the public in one respect, it would lead them back to the place where they were to get the genuine article, and imitation of which is improperly sought to be sold. For the accomplishment of such a fraud it is necessary in the first instance to mislead the public, and in the next place to secure a benefit to the party practising the deception by preserving his own individuality. There are many distinctions, even more than have been stated, between these two labels. It is truly said that if any one takes upon himself to study these two labels he will find several marks of distinction. On the other hand, the colors are of the same nature, the labels are exactly the same size, the letters are arranged precisely in the same mode, and the very same name appears on the face of the jars or the bottles in which the blacking is put. It appears, therefore, to me that there is quite sufficient to mislead the ordinary run of persons, and that the object of the defendant is to persuade the public that this new establishment is, in some way or other, connected with the old firm or manufacturer, and at the same time to get purchasers to go to 90½ Holborn Hill, and not to 97 High Holborn. I think what has been done here is quite calculated to effect that purpose, and the defendant must be restrained." Injunction is the proper remedy to protect a corporation in the use of its corporate name. *Goodyear Rubber Co. v. Goodyear Rubber Mfg. Co.*, 128 U. S. 598; 9 S. Ct. 166; *Newby v. Oregon, etc. R. R.*, Deady, 609; *Ex parte Walker*, 1 Tenn. Ch. 97. See also *Merchants, Detective Ass'n v. Detective Mercantile Agency. Relief against foreign corporation.*—Laws Mass. 1889, c. 452, § 2, provides that no foreign corporation shall carry on a banking, mortgage loan and investment, or trust business in Massachusetts under a name previously in use by a domestic corporation, or so nearly identical as to mislead. *Held*, that the proper party to petition for injunction under section 3 of the act, which provides that any of its provisions may, on petition, be enforced by injunction, is the party aggrieved by the actions of the foreign corporation; and a domestic corporation engaged in loaning and investing moneys received by it on securities, and receiving, discounting, and paying interest on deposits, is an aggrieved party, if the foreign corporation does business under an identical name, or one so similar as to mislead, as the business of the two corporations are the same or similar. *International Trust Co. v. International Loan & Trust Co.*, (Mass.) 26 N. E. 698. On an application by a corporation for an injunction against the organization of another corporation intending to do a similar business in the same place, and to bear a name very nearly the same as the name of the plaintiff corporation,

name or mark, or one similar with only a slight alteration, in such a way as to induce people to deal with him in the belief that they are dealing with a person who has given a good reputation to the name or mark; and equity will in such cases enjoin the use of such mark or name, whether it constitute a trade-mark or not.¹ So, though a dealer may have no proper trade-mark, yet where he has for a long period put up his wares in packages of uniform and distinguishable shape, size, and contents, with marks or brands similarly distinguishable and uniform, equity will protect him against fraudulent imitations of his packages calculated to deceive persons into the belief that they came from such dealer.² But an injunction against the use of terms which cannot be protected as trade-marks will not be granted where it does not appear that defendant has thereby represented to the public that the goods sold by him are those manufactured by plaintiff, but has persistently warned the public that it has no connection with plaintiff.³

it appeared that the plaintiff corporation had given up selling its goods in the general market, and that it sold them exclusively to a foreign corporation having the same name as that of the plaintiff corporation, and organized by the same stockholders. *Held*, that a case for an injunction was not made out, as the similarity of names could not in any way interfere with plaintiff's sales or injure its business. *Drummond Tobacco Co. v. Randle*, 114 Ill. 412; 2 N. E. 536. But the court refused to enjoin a foreign corporation from infringing at suit of another foreign corporation. *Employers' Ass'n Corp. v. Employers' Liability Ins. Co.*, 10 N. Y. S. 845. In these cases, as in actions involving individuals, the existence of an adequate remedy at law is a bar to relief. *London, etc. Soc. v. London, etc. Ins. Co.*, 11 Jur. 938; *Hinckley v. Breen*, 17 Am. & Eng. Corp. Cas. (Conn.) 294.

¹ *Pierce v. Guittard*, 68 Cal. 68; 8 P. 645; see also *The Accident Insurance Company, Limited, v. The Accident, Disease, & General Insurance Corporation, Limited*, 54 L. J. Ch. 104. In this case the plaintiff company having for many years carried on an insurance business under its name, the defendant company obtained registration, and began to issue prospectuses and advertisements under very nearly the same name. The offices of both companies were situated in the city of London. On motion of the plaintiff company, injunction granted to restrain the defendant company, until the hearing or further order, from using its name, or any other name calculated to cause the defendant company to be mistaken for the plaintiff company. *Using name of company out of business.* — Where a manufacturing company has sold part of its plant, and has ceased to do business for more than a year, it cannot maintain an action to enjoin any person from asserting that the company has gone out of business, and that he is its successor, since such acts cannot injure it. *Shonk Tin Printing Co. v. Shonk*, (Ill.) 27 N. E. 529.

² *Trask Fish Co. v. Wooster*, 28 Mo. App. 408.

³ *Goodyear Rubber Co. v. Goodyear Rubber Manuf. Co.*, 128 U. S. 598; 9 S. Ct. 166.

§ 899. **Name of Locality.** — The name of a municipality or locality cannot be exclusively appropriated by any one so as to entitle him to an injunction to restrain its adoption by others.¹ But one who has adopted such name as a trade-mark will be entitled to have restrained others living and doing business elsewhere from using it in such a way as is calculated to induce the public to believe that the goods manufactured or sold by such other persons are his.² Thus, a manufacturer of white lead in Chicago was enjoined from the use of the words "White Lead, St. Louis," except as to preparations of white lead manufactured there, such use tending to deceive and defraud the public and complainant, a manufacturer of white lead in St. Louis.³ And the manufacturer of goods who has for many years used as a trade-mark the geographical terms, "Lamoille" and "Willoughby Lake," will be protected in their use against one who does not carry on business in the districts so designated.⁴ But it was held that a suit to restrain the use of the name "Rosendale cement" in the denomination of cement manufactured and sold by the defendants could not be maintained, though such name was known by the public to mean cement made in Rosendale, and defendant's manufactory was in another state, unless it could be shown that the complainants had an exclusive ownership or property therein. It was considered not sufficient that they, in common with certain other persons, had a right to use it, and the public might be deceived by defendant's use of the name.⁵ But the name of a spring which a party owns, and

¹ *Glendon Iron Co. v. Uhler*, 75 Pa. St. 467. See also *Newman v. Alvord*, 51 N. Y. 189; *Lea v. Wolf*, 13 Abb. (N. Y.) Pr. n. s. 391.

² That geographical names cannot as a rule be used and protected as trade-marks, see with respect to "Moline" the name of a town in "Moline plow," *Candee v. Deere*, 54 Ill. 439; "Glendon," in *Glendon Iron Co. v. Uhler*, 75 Pa. St. 599; "Durham," *Blackwell v. Wright*, 73 N. C. 310.

³ *Southern White Lead Co. v. Coit*, 89 F. 492.

⁴ *Pike Manuf. Co. v. Cleveland Stone Co.*, 85 F. 896.

⁵ *New York & R. Cement Co. v. Coplay Cement Co.*, 44 F. 277. Where it appeared that the defendant in applying to calico prints the word "Amoskeag," which had previously been applied by plaintiff to very different kinds of goods, did not intend to represent thereby that his goods were of the plaintiff's manufacture, and that the trade and the public were in no danger of being deceived by such name, but it was employed only as describing the place where the manufacture was carried on, and to distinguish the calicoes from other grades manufactured by defendant; and also that the plaintiff had delayed for nine years before bringing suit, — it was held, that the plaintiff was

whose waters he sells under its name, may be exclusively used and protected.¹

§ 900. **Street Number.** — One using a street number as a part of his trade-mark, and having the exclusive use of the building constituting such number, may restrain persons from using it who have no right to or interest in the building, and who use the number as a part of their trade-mark to deceive the public and injure the owner.²

§ 901. **Combination of Letters of Alphabet.** — To entitle a party to protection in the use of letters of the alphabet, he must be shown to have used either a distinguishing and unique combination of them, or to have used them in combination with a peculiar design. And it was held that a trade-mark could not be acquired in the letters "LL," as applied to sheetings, the letters being used to signify a particular grade of sheetings; and the fact that plaintiff had used those letters for many years on its sheetings did not entitle it to injunction against another corporation which used them on its sheetings, on the ground of defendant's fraud by selling its goods as those of plaintiff, where the brands were entirely dissimilar in appearance, and there was no evidence of fraudulent intent.³ But a device bearing the name of the proprietors of a patent medicine, the name of the medicine, the proprietor's place of business, the names of the various diseases, etc., and consisting chiefly of a letter of the alphabet nine times repeated, arranged in three vertical columns, separated by lines or bars so as to form three groups of three B's each, this letter being the initial of the three words forming the name of the medicine, generic words belonging to the science, the whole so printed on the wrapper that when it

not entitled to an injunction. *Amoskeag Mfg. Co. v. Garner*, 55 Barb. 151. But in *Thompson v. Montgomery*, L. R. 41 Ch. Div. 35, it was held under the circumstances that the plaintiffs had acquired by user a right to use of the words "Stone Ale" within the principle of *Wotherspoon v. Currie*, Law Rep. 5 H. L. 508, and that the conduct of the defendant being in the opinion of the court calculated to deceive the public into supposing that his ales were brewed by the plaintiffs, the plaintiffs were entitled to an injunction.

¹ *Congress & Empire Sp. Co. v. High Rock, etc. Sp. Co.*, 45 N. Y. 291; *Dunbar v. Glenn*, 42 Wis. 218.

² *Glen, etc. Co. v. Hall*, 6 Lans. (N. Y.) 158. See also *Boulnois v. Peake*, L. R. 13 Ch. Div. 513, n.; *Civil Service Ass'n v. Dean*, 18 Ch. Div. 512.

³ Affirming 31 F. 776, *Lawrence Manuf. Co. v. Tennessee Manuf. Co.*, 11 S. Ct. 396. So with respect to "IXL," *Lichtenstein v. Mellis*, 8 Or. 464.

was placed around the package of the goods each of the three sides would present to view one of these combinations of B's, — is a label which the court will protect against infringement by other parties.¹

§ 902. **Designs adopted by Trades-unions.** — A design adopted and placed on goods manufactured by members of a trades-union will be protected as a trade-mark from infringement.² Accordingly a complainant was held to state a good cause of action which alleged that the cigar-makers' union was an incorporated association, organized for the purpose of improving the condition of its members, who were practical cigar makers, and to maintain a high standard of workmanship and fair wages; that it adopted a trade-mark known as the "Union Label" for the purpose of designating cigars made by the members of the union, and to guarantee that fair wages, etc., had been secured; that cigars bearing the "Union Label" commanded a higher price than similar cigars without the label; that the label is a source of great profit to the members of the union; that cigar-makers and the public have always acquiesced in the exclusive right of the members of the union to the label; and that defendant is imitating the label for the purpose of deceiving the public, to plaintiff's irreparable injury.³

§ 903. **Complainant's Title.** — To entitle a party to a preliminary injunction in an action brought to enjoin infringement of a trade-mark and for general relief, the legal right as well as its violation should be very clear.⁴ A patented printing-press

¹ *Foster v. Blood Balm Co.*, (Ga.) 3 S. E. 284. Complainants, on velvet ribbons manufactured and put up by them, used their trade-mark, "G. F." Defendants on some of their goods used their trade-mark, "G. & F." with the ampersand as prominent as the initials, as registered, but on their velvet ribbons printed it with the ampersand greatly reduced in size as compared with the initials. *Held*, that such use of the trade-mark was with intent to lead purchasers to believe that defendants' ribbons were those of complainants, and defendants should be restrained from using their trade-mark on ribbons, except with the ampersand of equal prominence with the initials. *Giron v. Gartner*, (Cir. Ct.) 47 F. 467.

² *Bloete v. Simon*, 19 Abb. N. C. 88; *Strasser v. Monelis*, 55 N. Y. Super. Ct. 197; *Allen v. McCarthy*, (Minn.) 34 N. W. 416. *Contra*, *Weener v. Brayton*, (Mass.) 25 N. E. 46; 152 Mass. 101.

³ *Bloete v. Simon*, 19 Abb. N. C. 88.

⁴ *Merrimack Manuf. Co. v. Garner*, 2 Abb. (N. Y.) Pr. 318; s. c. 4 E. D. Smith, (N. Y.) 387; *Partridge v. Menck*, 2 Barb. (N. Y.) Ch. 101; *Samuel v. Berger*, 4 Abb. (N. Y.) Pr. 88; s. c. 24 Barb. (N. Y.) 163; 13 How. Pr. (N. Y.) 342.

was called by the patentee the "Universal," and was stamped with that name and the names of the manufacturers who made them for the patentee. It was held that after the expiration of the patent the patentee was not entitled to be protected in the use of the word "Universal" as a trade-mark.¹ And a person who uses a trade-mark that another, by reason of its prior adoption, has the exclusive right to use, cannot restrain a third person from also using it.²

§ 904. **Doubt as to Title, or Nature of Injury.** — Complainant will usually be entitled to an injunction upon clear proof of title and infringement, the inadequacy of legal remedies being so apparent as to dispense with proof upon the character and extent of the injury. But when there is anything in the circumstances rendering it inequitable, or showing that complainant can be adequately compensated by action at law, or his case as presented leaves it doubtful as to his title to relief, the court may exercise its discretion to refuse an injunction.³

§ 905. **No Relief where Alleged Trade-mark itself a Fraud on Public.** — A trade-mark adopted as a part of a scheme to deceive the public will not be protected by injunction.⁴ And a manufacturer who falsely represents the composition of his goods by the labels on his packages is in no position to enjoin a rival manufacturer from using similar labels and packages on the ground that the latter thereby deceives the public.⁵ Nor will

¹ *Gally v. Colt's Patent Fire-Arms Manuf. Co.*, 80 F. 118.

² *Parlett v. Guggenheimer*, 67 Md. 542; 10 A. 81.

³ See *Lies v. Daniel*, (Ga.) 8 S. E. 432; 82 Ga. 272. See also *Baeder v. Baeder*, 5 N. Y. S. 123; 52 Hun, 170; 5 N. Y. S. 124.

⁴ *Fettridge v. Wells*, 4 Abb. Pr. 144; *Hurricane Lantern Co. v. Miller*, 56 How. (N. Y.) Pr. 234; *Hobbs v. Francais*, 19 How. Pr. 567; *Smith v. Woodruff*, 48 Barb. 43; *Hennessy v. Wheeler*, 51 How. (N. Y.) Pr. 457; *Curtis v. Bryan*, 2 Daly (N. Y.), 312; s. c. 36 How. Pr. (N. Y.) 33; *Talcott v. Moore*, 13 N. Y. 106; *Koehler v. Sanders*, 48 Hun, 48; *Laird v. Wilder*, 9 Bush (Ky.), 131; *Frazer v. Frazer Lubricator Co.*, 18 Ill. App. 450; *Ford v. Foster*, L. R. 7 Ch. 611; *New Haven, etc. Co. v. Farren*, 51 Conn. 324; *Dreydoppel v. Young*, 14 Phila. (Pa.) 226. See *Fettridge v. Merchant*, 4 Abb. Pr. (N. Y.) 156; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218; *Seabury v. Grosvenor*, 53 How. (N. Y.) Pr. 192; *Helmbold v. Helmbold Manuf. Co.*, 53 How. (N. Y.) Pr. 453.

⁵ *Clotworthy v. Schepp*, 42 F. 62. The use of the word "Habana" on a label, when in fact the cigars on which the label appeared were merely Havana fillers, is such a deceit on the public that equity will furnish no relief against an infringement. *Solis Cigar Co. v. Pozo*, (Colo.) 26 P. 556. But the use of the word "Magnetic" in the title, M.'s "Universal Magnetic Balm," where

equity protect from imitation a trade-mark, if the trade in which it is used be immoral or illegal.¹ And an injunction was refused where sought by a cigar-makers' union on the ground that the label on its face showed that its purpose was to stigmatize all cigar-makers who were not members of the union, irrespective of their characters.² But a mere exaggerated statement of an article's merits will not deprive its proprietor of the benefits of protection against its imitation.³ And it was held that the presence of the word "copyrighted" on a label, when in fact it had not been copyrighted, was not such a misrepresentation as would prevent the owner's receiving protection.⁴ So where the plaintiff, whose trade-mark was "Ford's Eureka Shirt," had falsely represented in his invoices and advertisements that he was a patentee of the shirt, it was held that such false representation was not sufficient to prevent him from sustaining an action at law; and his right at law being clear, he was entitled to protection by injunction.⁵

§ 906. *Diligence in seeking Relief.* — In these, as in other cases, a party by laches or by long delay, with knowledge of the facts amounting to acquiescence, becomes barred of relief by injunction;⁶ and although an injunction against the further infringement of a trade-mark is granted, the plaintiff's laches in seeking relief may preclude him from claiming damages.⁷

In an action to restrain defendant from using a trade-mark there was no pretence that liquid possessed any magnetic qualities, does not show any fraudulent intent to deceive the public which would deprive the plaintiff of its right to an injunction. *D. Ransom, Son & Co. v. Ball*, 7 N. Y. S. 238.

¹ *Ford v. Foster*, L. R. 7 Ch. 611.

² *McVey v. Brendel*, (Pa. Sup.) 22 A. 912.

³ *Curtis v. Bryan*, 2 Daly (N. Y.), 312; s. c. 36 How. (N. Y.) Pr. 83; *Hobbs v. Francais*, 19 How. (N. Y.) Pr. 567; *Fetridge v. Wells*, 18 How. Pr. (N. Y.) 385; s. c. 4 Abb. Pr. (N. Y.) 144.

⁴ *Solis Cigar Co. v. Pozo*, (Colo.) 26 P. 556.

⁵ *Ford v. Foster*, L. R. 7 Ch. 611. See also *Marshall v. Ross*, L. R. 8 Eq. 651.

⁶ *Amoskeag Manuf. Co v. Garner*, 6 Abb. (N. Y.) Pr. n. s. 265; *Isaacson v. Thompson*, 41 L. J. Ch. 101; 20 W. R. 196. It appearing that the infringement or simulation of plaintiff's trade-mark complained of began in November, 1878, but was not made complete until some time in 1879, and that plaintiff's action for an injunction and for damages was brought within five or six months thereafter, — *held*, there was no such laches as would bar plaintiff's right to relief. *Avery v. Meikle*, 85 Ky. 435; 3 S. W. 609.

⁷ *McLean v. Fleming*, 96 U. S. 245.

which both parties claimed, an instruction that if both parties had used it for one year and upwards without any attempt to interfere with each other's use, the jury should find for defendant; but if plaintiff was the exclusive owner, and had done nothing which would lead defendant to believe that it had abandoned its right, and had always objected to defendant's use of it, when such use came to plaintiff's knowledge, they should find for plaintiff, is not open to objection on the part of the defendant.¹

II. ACTS ENJOINED AS INFRINGEMENT; DECEPTION OF PUBLIC.

§ 907. What constitutes Infringement.	§ 914. Similarity of Packages.
908. Same Subject — Infringing Imitations.	915. Use of Similar Wrappers.
909. Same Subject — Illustrations.	916. Protection of Assignee.
910. Aiding and abetting Infringement.	917. Injunction after licensing — Termination of License.
911. Imitation of Mere Device — Advertising Cut.	918. Motives of Infringer immaterial.
912. Imitation of Label.	919. Superior Quality of Defendant's Goods immaterial.
913. Use of Same Words — Words in Connection with Design.	920. What the Complaint should set forth.

§ 907. **What constitutes Infringement.** — The most important test for determining the question whether an act or course of conduct constitutes an infringement which complainant is entitled to have restrained is whether, allowing the defendant to proceed, third parties will be misled to their injury or to the injury of the complainant.² No trader has a right to use a trade-mark so nearly resembling that of another trader as to be calculated to mislead incautious purchasers, and the use of such a trade-mark may be restrained by injunction, although no purchaser has actually been misled.³ Not only is it not necessary

¹ *Durham Tobacco Co. v. McElwee*, (N. C.) 5 S. E. 907.

² *Partridge v. Menck*, 2 Barb. (N. Y.) Ch. 101; *Smith v. Woodruff*, 48 Barb. (N. Y.) 438; *Walton v. Crowley*, 3 Blatch. (U. S.) 340; *Brooklyn White Lead Co. v. Masury*, 25 Barb. (N. Y.) 417; *Newman v. Alvord*, 49 Barb. (N. Y.) 687; *Clark v. Clark*, 25 Barb. (N. Y.) 76; *Popham v. Cole*, 66 N. Y. 69; *Blackwell v. Wright*, 73 N. C. 310; *Osgood v. Allen*, 1 Holmes (U. S.), 135; *American Grocer Publishing Ass'n v. Grocer Publishing Co.*, 51 How. (N. Y.) Pr. 403; *Rowley v. Houghton*, 2 Brewst. (Pa.) 303; s. c. 7 Phila. (Pa.) 89. In an action to enjoin defendant's firm manufacturing and selling stationery in imitation of that made and sold by plaintiff, where the evidence failed to show that any purchaser had ever been or was likely to be deceived by the alleged similarity of the goods, the injunction was properly denied. *Marcus Ward Co. v. Ward*, (Sup.) 15 N. Y. S. 913.

³ *Johnston v. Orr Ewing*, L. R. 7 App. Cas. 219. Defendant having car-

to prove that any one has been deceived by defendant's acts, but plaintiff need not show that he even intended to deceive or defraud.¹ On the other hand, the use of a label on packages or bottles of merchandise will not be enjoined where there is no attempt at deception thereby, and where other labels used by defendant are so unlike those of complainant's that no mistake could arise between them.² And the fact that a manufacturer has adopted a particular style of bottle does not prevent a rival from using a bottle of the same style, if the bottle is sold to the public generally.³

§ 908. **Same Subject — Infringing Imitations.** — The general rule governing courts in these cases may be stated in another form: The granting of an injunction is warranted to restrain the use of names, marks, letters, or indicia, by which a party may induce purchaser to believe that the goods he is selling are the manufacture of another.⁴ And it seems that there may be an infringement by acts and conduct accompanying the sale of a spurious article, as that made or dealt in by complainant, without a resort to any imitating device whatever.⁵ Nor is it nec-

ried on business for some years in New York under the names of the "Westchester Hat Company" and "Westchester Clothing Company," adopted the name "New York and Westchester Clothing Company" at his place of business, and in advertising. Plaintiffs afterwards adopted the name "Harlem and Westchester Clothing Company," which they used at their store, more than a mile from defendant's, but made no objection, during more than seven years, to the use by the latter of the name adopted by him, although having for part of the time a branch store opposite defendant's. Neither was a manufacturer of goods. *Held*, that plaintiffs could not prevent the use by defendant of the name "Westchester." *Wormser v. Levy*, 12 N. Y. S. 558.

¹ *Cahn v. Gottschalk*, 2 N. Y. S. 13.

² *Mumm v. Kirk*, 40 F. 589.

³ *Hoyt v. Hoyt*, (Pa. Sup.) 22 A. 755.

⁴ *Anheuser Busch Brewing Association v. Clarke*, 26 Fed. Rep. 410; *Pierce v. Guittard*, 68 Cal. 68; *Royal Baking Powder Co. v. Davis*, 26 Fed. Rep. 293; *Pratt Manuf. Co. v. Astral Refining Co.*, 27 Fed. Rep. 492; *Glen Cove Manuf. Co. v. Ludeling*, 22 Fed. Rep. 823; *Southern White Lead Co. v. Cary*, 25 Fed. Rep. 125; *Alexander v. Morse*, 14 R. I. 153; s. c. 51 Am. Rep. 369; *New York Cab Co. v. Mooney*, 15 Abb. (N. Y.) N. Cas. 152.

⁵ *Enoch Morgan's Sons Co. v. Wendover*, 43 F. 420. In this case it appeared that complainant had a trade-mark in the word "Sapolio," used to designate a particular kind of soap. When persons called at defendant's store and asked for "Sapolio," their salesman would, without explanation, pass out a soap called "Pride of the Kitchen," on which these words were plainly marked, and receive the customary price. The wrappers used on the two soaps were entirely different, and the size and shape of the cakes also differed. *Held*,

essary to constitute an infringement entitling the owner to preventive relief that the trade-mark should be copied in every particular. It is sufficient if the imitation be carried so far as to deceive and mislead the public or the patrons of the originator;¹ for an imitation of a trade-mark with only such differences as would escape the notice of the public does the owner as much injury as a palpable imitation, and will be enjoined as an infringement of his right.² An imitation will be enjoined when to distinguish it from a manufactured article requires a careful inspection.³ If one trader appropriates a material and substantial part of a trade-mark which belongs to another trader he is bound to use such precautions as to avoid the reasonable probability of error and deception, and the *onus* is on him to show that purchasers of the goods will not be deceived. If the goods of a trader have acquired in the market a name derived from a part of the trade-mark which he affixes to them, a rival trader is not entitled to use a ticket which is likely to lead to the application of the same name to his goods, even though that name is not the only name by which the goods of the first trader have been known, or though it has been always used in conjunction with some other words. And where a trader has a right

that though there was no use of the word "Sapolio" on the soap, and no resemblance in the packages, the transaction amounted to an infringement of plaintiff's trade-mark, and would be enjoined.

¹ *Candee v. Deere*, 54 Ill. 439; s. c. 10 Am. Law Reg. 694; *Walton v. Crowley*, 3 Blatchf. (U. S.) 440; *Seixo v. Provenende*, 1 Ch. App. 194; *Edleston v. Vick*, 23 Eng. C. L. & Eq. 53; *Motley v. Downman*, 3 Myl. & Cr. 338; *Coffeen v. Brunton*, 4 McLean (U. S.), 518; *Amoskeag Manuf. Co. v. Spear*, 2 Sandf. (N. Y.) 606; *Filley v. Fassett*, 44 Mo. 168; s. c. 8 Am. Law Reg. 402; *Gillott v. Esterbrook*, 47 Barb. (N. Y.) 469. A manufacturer of an article of dentistry printed on the boxes containing it the words "Non-Secret Dental Vulcanite, made according to our analysis of the Akron Dental Rubber;" the words "Akron Iron Dental Rubber" being the trade-mark of a competitor, and being printed in red ink and large type. The preceding words were printed in large black type, and the formula for the preparation of the article followed in red ink in very small type. *Held*, that the label was likely to mislead, and was an infringement, and that its use should be enjoined. *Keller v. B. F. Goodrich Co.*, 117 Ind. 556; 19 N. E. 196.

² *Clark v. Clark*, 25 Barb. (N. Y.) 76. An injunction was issued restraining the defendant from using a certain trade-mark. He afterwards used the same mark with the word "improved" affixed, and added, upon the label, that such article was not the original article. *Held*, under the circumstances, a breach of the injunction. *Ayer v. Hall*, 3 Brews. (Pa.) 509.

³ *Partridge v. Menck*, 2 Sandf. (N. Y.) Ch. 622; *McLean v. Fleming*, 6 Otto, (U. S.) 245; *Appeal of Brueckmann*, (Pa.) 19 A. 674.

to a trade-mark on goods sold in a foreign market an injunction will be granted to restrain the export of goods under another trade-mark which may deceive the ultimate purchasers, although it would not deceive Englishmen or the first purchasers in the foreign market.¹ But an injunction should never be granted when the resemblance of the two articles is not so close as to deceive the mass of purchasers, nor when there is substantial doubt as to the alleged piracy.²

§ 909. **Same Subject — Illustrations.** — Where the imitation of plaintiff's labels, bottles, and wrappers, together with the use of the word "Nerve Food," as used by plaintiff, is calculated to deceive the public as to the identity of the contents of the bottles, a preliminary injunction should issue.³ So where for many years the plaintiff had made tobacco, to each plug of which it attached six five-pointed stars made of tin, with a hole in the centre, and after the "Star" tobacco had become well known, the defendant

¹ *Orr Ewing & Co. v. Johnston*, L. R. 13 Ch. Div. 434. In *Lee v. Haley*, L. R. 5 Ch. 155, plaintiff's company had for some years used as their trade-mark "The Guinea Coal Company." Defendants enjoined from using the name "Pall Mall Guinea Coal Company."

² *Partridge v. Menck*, 2 Sandf. (N. Y.) Ch. 622; s. c. 2 Barb. (N. Y.) Ch. 101; How. (N. Y.) App. Cas. 547; *Merrimack Mfg. Co. v. Garner*, 4 E. D. Smith (N. Y.), 387; s. c. 2 Abb. Pr. (N. Y.) 318; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599. The manufacturer of an uncooked pudding, put up in packages, under the trade-mark name of "Puddine," cannot enjoin the maker of a similar preparation from using the word "Pudding" in describing it. *Clotworthy v. Schepp*, 42 F. 62. An advertisement of plasters manufactured and sold by defendant, as "Benson's Porous Plasters; Benson's Capcine Porous Plasters; Benson's Plasters, the Best Porous Plaster," does not violate an injunction restraining defendants from using the word "Porous" by affixing or applying it to any plasters manufactured, shipped, sold, or supplied by them, or to the boxes in which they are put up. *Porous Plaster Co. v. Seabury*, 1 N. Y. S. 134.

³ *Moxie Nerve Food Co. v. Beach*, 38 F. 248. In a suit for infringing a trade-mark, it appeared that for many years plaintiff had manufactured and sold a chemical preparation for medicinal purposes under the name of "Bromidia," a word coined for and arbitrarily applied to the preparation, and that in 1881 it had registered that word as a trade-mark in the patent office; that defendants subsequently manufactured and sold a similar compound, intended for the same uses, which they labelled "Compound Elixir Chloral & Bromide of Potassium," underneath which, in large letters, the most prominent and conspicuous word on the label is the word "Bromidia," while below, in smaller type, though distinct and of good size, is a statement that it is prepared by defendants. *Held*, an infringement of the trade-mark, by which incautious purchasers are likely to be deceived, and that an injunction *pendente lite* must be granted. *Battle & Co. v. Finlay*, 45 F. 796.

put on the market a "Buzz Saw" tobacco, to which was attached a tin symbol of the same size as the plaintiff's, with eight points slightly inclined to the right, a hole in the centre, and the words "Buzz Saw" dimly impressed on the surface, it was held that the "Buzz Saw" symbol was an infringement of the plaintiff's trade-mark, and that its use should be enjoined.¹ In another case it appeared that the plaintiff, who was a wine and spirit merchant, registered a trade-mark together with the word "Strathmore Blend," which was the name of a certain blend of various whiskeys made and sold by him, and he advertised the same very widely. Many of the plaintiff's customers were in the habit of ordering his whiskey, calling it "Strathmore whiskey," omitting the word "blend," and the whiskey became known as "Strathmore whiskey." The defendant subsequently registered a trade-mark and the name of "Strathmore" for a whiskey blended and sold by him. The question being whether the use of the word "Strathmore" by the defendant was calculated to deceive, it was held that the word "blend" described simply the operation of manufacturing, and was not an essential part of the name of the plaintiff's whiskey; that the word "Strathmore" was a fancy name; that the use of that word by any person, other than the plaintiff, as a name for whiskey, would be calculated to deceive; and that the defendant must be restrained by injunction from using the word either as part of his trade-mark or otherwise.²

§ 910. **Aiding and abetting Infringement.** — It is not necessary for complainant to prove that defendant directly imitated his trade-mark or did the acts amounting to an infringement if it be made to appear that he participated therein, or aided and advised his customers to do so. Thus, where it appeared that defendant manufactured an article of bitters closely resembling plaintiff's in appearance and flavor, which it sold in bulk to its customers, advising them at the same time to refill bottles that originally contained plaintiff's bitters, with the spurious article, and put them on the market as genuine; that in all probability the plaintiff had been thereby to some extent damaged, and the public deceived, it was held that, though defendant did not itself

¹ *Liggett & Myers Tobacco Co. v. Sam Reid Tobacco Co.*, (Mo.) 15 S. W. 843.

² *Blair v. Stock*, 52 L. T. 123.

use plaintiff's labels and bottles, still in advising its customers it was guilty of a wrong which a court of equity will enjoin.¹

§ 911. *Imitation of Mere Device — Advertising Cut.* — There may be such originality in a mechanical contrivance or artistic design attached to or engraved on articles of manufacture and merchandise, as will constitute it a trade-mark entitling its owner to have others enjoined from copying or imitating it, though no words, letters, or numbers be used in combination with it. Thus, where plaintiff used, on the bottles in which it sold liquid bluing, a bright metallic cap of tin, extending down over about half of the rim at the mouth of the bottle, the cap having six perforations, it was held that defendant should be restrained from using for the sale of his bluing a similar cap on bottles of the same shape and appearance as those of plaintiff.² On the same principle a real-estate auctioneer who for many years has sold suburban property on the instalment plan, and who has always used in his business, and for several years has had printed in connection with his advertisements, a representation of a flag with stars on the upper and lower borders, is entitled to an injunction against the use of the like arrangement of stars upon the representation of a flag used in the advertisements of another person in the same business.³

§ 912. *Imitation of Label.* — The imitation of labels on which trade-marks are stamped will in all proper cases be restrained. Thus, where complainants had built up a business as agents for the sale of canned salmon, and in such business had been in the habit of using a printed label placed on the cans, giving their firm name and a statement that they were the sole agents for such brand of canned salmon, injunction was granted to restrain the false and fraudulent use by defendants of that part of a label which represented that complainants were the sole agents for defendants' salmon, and it was held to be immaterial whether defendants' salmon were of an equal or inferior quality to those sold by complainants.⁴ But a preliminary injunction should not

¹ *Hostetter Co. v. Brueggeman-Reinert Distilling Co.*, 46 F. 188.

² *Sawyer Crystal Blue Co. v. Hubbard*, 82 F. 388.

³ *Johnson v. Hitchcock*, 3 N. Y. S. 680.

⁴ *Coleman v. Flavel*, 40 F. 854. *Smoking-tobacco wrappers.* — The labels on complainant's tobacco packages had a representation of a shield or banner and an ellipse with a circle, and the words "Smoke and Chew." The colors used were red and yellow. Defendant's labels had the same figures and colors,

be granted restraining the use of a label or wrapper claimed to be an imitation of complainants' label, where it does not clearly appear that the defendants' is such an imitation as will and does deceive the public, or that the complainants will suffer irreparable damages by a denial of an injunction.¹

§ 913. **Use of Same Words—Words in Connection with Design.** — While words in common use may not alone constitute a valid trade-mark entitled to protection, yet when used in connection with a peculiar device or design, or so as to form a unique combination, it is otherwise. Thus, the words "Warren Hose Supporter," when used in connection with a cut of a hose supporter engaged with a stocking, and placed, as labels, on boxes containing hose supporters, they are sufficiently arbitrary to fairly denote the origin of the goods, and are entitled to protection as a trade-mark.² So where plaintiff, a manufacturer of plug twist chewing tobacco, marked the words "Golden Crown" on the boxes in which it was packed, and fastened four tin tags of a particular size, shape, lettering, and position on each bar of the tobacco, with the words "Golden Crown" on each, and defend-

and the words "Smoke and Chew," and were so much like complainant's that one might easily be mistaken for the other. One was called "Peach Blossom," and the other "Sweet Lotus." *Held*, that defendant's wrappers were a palpable imitation of complainant's, and that their use should be enjoined. *Wellman & Dwire Tobacco Co. v. Ware Tobacco-Works*, 46 F. 289. *Food preparation.* — In an action to enjoin defendant from counterfeiting certain trade-marks and labels of plaintiff, it appeared that the packages used by plaintiff and defendant were of the same size, shape, and material with labels of the same size, shape, and position, which were printed in the same colors, with the same alternations; that wherever on plaintiff's label there was a progressive increase of the size of letters, there was the same on defendant's label; that the sentences and pictures on the latter were very similar to those on the former, and in some instances were the same; that the word "germ," used by defendant, was similar in sound and appearance to the word "germea," coined by the plaintiff; that the words "Trade-Mark Registered," in similar colors, type, and position, were on both packages, though defendant had not registered any trade-mark at the time the action was brought, while plaintiff's labels were registered several years before the infringement complained of began. It further appeared that the person who prepared defendant's package and labels had those of plaintiff before him; and one witness testified that he dealt in both articles, keeping the packages side by side, and when asked for the plaintiff's article he had sold that of defendant. *Held*, that plaintiff was entitled to judgment. *Sperry & Co. v. Percival Milling Co.*, (Cal.) 22 P. 651; 81 Cal. 252.

¹ *Foster v. Blood Balm Co.*, 77 Ga. 216; 3 S. E. 284.

² *Frost v. Rindskopf*, 42 F. 408.

ant in the sale of his plug tobacco used the words "Golden Chain" in connection with tin tags lettered and arranged in a manner similar to plaintiff's, it was held that, while the words "Golden Chain" might not be an infringement, their use in connection with the tags should be restrained.¹ And the word "Valvoline" compounded and used on packages of lubricating oils by plaintiffs, and registered as a trade-mark, may be used for that purpose, and the use thereof by another in the same manner will be enjoined, though such other used his own name in connection with the word.²

§ 914. **Similarity of Packages.** — There cannot be infringement by reason of similarity of boxes or form of packages in which commodities are sold without more.³ But it is otherwise when not only the form and size of the packages are reproduced, but the words and other indicia used by complainant are imitated by defendant. In that case, anything in the form or size of the packages in which the commodity is sold which aids the deception of the public may be considered. Thus, where defendant's boxes of medicine, as prepared for market, bore a close and intentional resemblance to plaintiff's boxes externally, and the arrangement and number of the bottles of ointment, medicator, pamphlet, and labels, was calculated to mislead the public, it was held that plaintiff was entitled to an injunction restraining defendant from infringing on his original and peculiar method of preparing, wrapping, boxing, and packing his medicines.⁴

¹ Parlett v. Guggenheimer, 67 Md. 542; 10 A. 81.

² Leonard v. White's Golden Lubricator Co., 38 F. 922. See also Metcalfe v. Brand, 86 Ky. 331; Schneider v. Williams, 44 N. J. Eq. 391; Russia Cement Co. v. Le Page, 147 Mass. 206; Cahn v. Gottschalk, 14 Daly, 542; Kenny v. Gillet, (Md.) 17 A. 499; 70 Md. 574. Injunctions granted to restrain use of "Dr. Morse's Improved Yellow Dock and Sarsaparilla Compound" for "Morse's Compound of Yellow Dock Root," 14 R. I. 153; s. c. 51 Am. Rep. 369; "Lone Jack Cigarettes" for "Lone Jack Smoking Tobacco," Carroll v. Ertheiler, 14 Phila. (Pa.) 424; "Electric-Silicon" for "Electro-Silicon," Electro-Silicon Co. v. Trask, 59 How. (N. Y.) Pr. 189.

³ Fleischman v. Newman, 2 N. Y. S. 608.

CIGARS IN BOXES. — Where the mode in which plaintiffs and their assignor packed their cigars under the trade-mark "La Normandi," the kind of boxes used, the number in a box, the number in each bunch, the particular color of ribbon, and the size and shape of the cigars, were old in the trade prior to the adoption of plaintiffs' trade-mark, and cigars thus packed, and resembling plaintiffs', had been sold widely prior thereto, under the name "La Normanda," the use of the words "La Normanda" will not be enjoined to protect plaintiff. Stachelberg v. Ponce, 128 U. S. 686; 9 S. Ct. 200.

⁴ Humphrey's Homeopathic Med. Co. v. Bell, 2 N. Y. S. 50. "Johnson's

§ 915. **Use of similar Wrappers.** — To entitle a party to an injunction against the use of wrappers for merchandise sold to customers alleged to imitate complainant's, it must be shown that such wrappers contain words, devices, or designs calculated to induce purchasers to believe that the goods sold are the manufacture or product of complainant, when in fact they are not such.¹ And when a servant, after leaving his master's employment, is entitled to carry on a business of the same character as his former employer, he may obtain the custom of the latter's customers, and use trade wrappers and other trade papers, notwithstanding his former employer does so, and employ the same printer; but he can only exercise these rights in such a manner as not to represent that his business and goods are the business and goods of his former master; if he does so represent, he may be restrained from so doing by injunction.²

Anodyne Liniment" had been sold for more than fifty years in bottles of a certain size and style, having a blue wrapper and a purplish label, bearing a certain description and a fac-simile of the name of A. Johnson, the original proprietor. Defendant's article was called "Johnson's Anodyne Liniment," and appeared in the same size bottles, with a similar blue wrapper, and a label differing but little from that of the genuine article, except in a not very marked difference in color, and bore the fac-simile of defendant's name, "F. E. Johnson." There was evidence of actual deception. *Held*, that defendant should be restrained from the sale of his article in such form. *Jennings v. Johnson*, 37 F. 364. See also *Philadelphia Novelty Manuf. Co. v. Blakesley Novelty Co.*, 37 F. 365. **Packets of soap.** — The defendants, who were soap manufacturers, brought out their soap in packets so closely resembling those in which the plaintiffs, who were also soap manufacturers, had been in the habit of bringing out their soap, as to be calculated to deceive the purchasers, — *held*, by Chitty, J., that although the retail dealers who bought soap from the defendants would not be deceived, the defendants by their imitation of the plaintiffs' packets put into the hands of the retail dealers an instrument of fraud, and ought to be restrained by injunction. An injunction was accordingly granted, and an account was directed of the profits by the defendants in selling soap in the form in which it was held they were not entitled to sell it. On appeal it was held that the injunction had been rightly granted, and that the account was in the proper form, and ought not to be limited by excluding from it soap which the retail dealers sold to persons who bought it as the defendants' soap. *Lever v. Goodwin*, L. R. 36 Ch. Div. 1.

¹ *Babbitt v. Brown*, 12 N. Y. S. 409.

² *Hart v. Colley*, 44 Ch. Div. 193. See *Siegert v. Findlater*, L. R. 7 Ch. Div. 801. Defendant, in the preparation and sale of a medicine, imitated exactly the name of the medicine, the description of it, the directions for its use, and the design of the wrappers used by plaintiff. The inner wrapper of plaintiff's medicine described it as "prepared by Dr. M.," who had originally prepared it, and sold out his interest to plaintiff; but the outer wrapper described it as prepared by plaintiff. M. had assumed or acquired from his business the title

§ 916. **Protection of Assignee.** — Property in a trade-mark is assignable, and an assignee may enjoin an infringement.¹ As distinct property, separate from the article created by the original producer or manufacturer, it may not be the subject of sale; but when the trade-mark is affixed to articles manufactured at a particular establishment, and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred, either by contract or by operation of law, to others, the right to the use of the trade-mark may be lawfully transferred with it. Its subsequent use by the person to whom the establishment is transferred is considered as only indicating that the goods to which it is affixed are manufactured at the same place, and are of the same character as those to which the mark is attached by its original designer.² And when, after the adoption of a trade-mark by an individual dealer, a corporation was formed in which such party became manager and largest stockholder, turned over to it his whole business, good-will, and trade, and although there was no formal transfer of the trade-mark the corporation continued its use, it was held that the corporation would not be denied relief against a third person on account of the condition of the title.³ But where the propri-

of "Doctor." *Held*, that the statements as to its preparation were not a fraud on the public, and constituted no defence in a suit by plaintiff to enjoin such use by defendant. *D. Ransom, Son & Co. v. Ball*, 7 N. Y. S. 238.

¹ *Dixon Crucible Co. v. Grugenheim*, 2 Brewst. (Pa.) 321; s. c. 7 Phila. (Pa.) 408; *Smith v. Woodruff*, 48 Barb. (N. Y.) 438; *Low v. Hart*, 90 N. Y. 457; *Royal Baking Powder Co. v. Sherrill*, 59 How. (N. Y.) Pr. 17; *Dreydoppel v. Young*, 14 Phila. (Pa.) 226; *Alexander v. Morse*, 14 R. I. 153; s. c. 51 Am. Rep. 369.

² *Leather Cloth Co. v. Am. L. Cloth Co.*, 11 Jur. n. s. 513; *Ainsworth v. Walmsley*, 44 L. J. 355. See also *Hall v. Barrows*, 10 Jur. n. s. 55; *Kidd v. Johnson*, 102 U. S. 617; *Witthaus v. Braun*, 44 Md. 303.

³ *Solis Cigar Co. v. Pozo*, (Colo.) 26 P. 556. See also *Russia Cement Co. v. Le Page*, 147 Mass. 206; 17 N. E. 304. *Infringement by assignor.* — Defendant, Frazer, the patentee of an article known as "Frazer's Axle Grease," "Frazer's Lubricator," or "Frazer's Grease," sold his present and future interest therein to plaintiffs, authorized the use of his name in the manufacture and sale by them of such article, and agreed to refrain from the manufacture and sale thereof, or the use of his name in connection therewith. Thereafter he obtained a patent for an alleged improved axle grease, composed of essentially the same ingredients, though mixed in different proportions. This he sold in packages somewhat different from plaintiffs, but marked "Frazer & Co." in good-sized letters. *Held*, a breach of the contract with plaintiffs which would be enjoined. *Frazer v. Frazer Lubricator Co.*, 121 Ill. 147; 13 N. E. 639.

etor of a medicine transfers the right to use his trade-mark and formula without transferring the place of manufacture, or plant used, or the good-will of the business, and there is no exclusive right to manufacture the medicine in any one, and there is nothing in the trade-mark to indicate that the medicine comes from a particular manufactory, the grantee cannot restrain another person from using it, as the only effect of the trade-mark is to indicate a class of goods which any one, who knows how, may manufacture.¹

The principle above stated applies where the good-will and business of a firm has been transferred, or it has been dissolved, to prevent an unauthorized use of the trade-name; and after the dissolution of a firm, an injunction will be granted in favor of an individual member to restrain the use of the firm name by the purchaser of the business; and the bill need not allege special damage.²

§ 917. *Injunction after licensing — Termination of License.* — The owner of a trade-mark is not estopped from bringing suit to enjoin an infringement of it by the fact that he has made a third party his licensee for the territory in which the defendant carries on the business as to which the infringement is charged.³ On the same principle where the plaintiff, as manager of an omnibus company, became, under the provisions of the statutes and rules for the regulation of metropolitan stage-carriages, the licensee of their vehicles, and having ceased to be such manager, it was held that he was entitled to an injunction to restrain the company from continuing to use his name upon the number plates affixed to their carriages.⁴

¹ *Chadwick v. Covell*, 151 Mass. 190; 23 N. E. 1068.

² *Reeves v. Denicke*, 12 Abb. Pr. (N. Y.) n. s. 92. See *Peterson v. Humphrey*, 4 Abb. Pr. (N. Y.) 394; *Fenn v. Bolles*, 7 Abb. Pr. (N. Y.) 202; *Ottaman Cahvey Co. v. Dane*, 95 Ill. 203.

³ *Moxie Nerve Food Co. v. Baumbach*, 32 F. 205.

⁴ *Hodges v. The London Trams Omnibus Company*, L. R. 12 Q. B. D. 105. Where complainant, who had conveyed to plaintiff the use of his name for manufacturing purposes for twenty years, after that time files a bill to enjoin the further use of his name, and the contract is asserted by defendants to have conveyed a perpetual right to his name, and the bill alleges that the actual contract between the parties limited the period to twenty years, and that if the writings are capable of being so construed as to give an unlimited right to defendants, then such construction would be a fraud on complainant, and ought not to be adopted, such allegation sufficiently charges fraud. *Dobbins v. Cragin*, (N. J. Ch.) 23 A. 172.

§ 918. **Motives of Infringer immaterial.** — It has been frequently held, both in this country and in England, that it is not essential to a party's right to relief that the infringement was intentional. While the deception practised upon the public is an important consideration, yet the jurisdiction is based upon the property right which a party has in his trade-mark.¹ Consequently, one who in good faith uses a label in ignorance of the fact that it is another's trade-mark, will be enjoined from further use; but if the owner knew of such use, and through indifference or negligence took no steps to protect his rights, he is not entitled to an account of sales or damages.² But where complainants manufactured silk thread, and used on the best quality a particular device, and defendant, acting for a third person, sold a quantity of thread bearing this device, under the belief that it was the best quality of complainants' manufacture, but it was discovered afterwards, that, though manufactured by complainants, the silk was of an inferior quality and had been redyed, when defendant took back the silk and held it for the true owner, it was held that this would not be a sufficient ground to restrain the defendant from selling it.³

§ 919. **Superior Quality of Defendant's Goods immaterial.** — It is no ground for refusing relief that an article which is an imitation of a manufactured article is equal in quality to the original, or that the maker or vendor of the spurious article informs purchasers that the article is an imitation.⁴ The true principle for this rule is that a manufacturer who has produced an article of merchandise, and applied to it a particular fancy name, and sold it with a particular mark, under which name and mark it has obtained currency in the market, acquires an exclusive right to the use of such name and mark, and is entitled to restrain all

¹ *Coffeen v. Brunton*, 4 McLean (U. S.) 516; *Davis v. Kendall*, 2 R. I. 566; *Metcalf v. Brand*, 86 Ky. 331; 5 S. W. 773; *Rodgers v. Nowill*, 6 Hare, 325; *Dale v. Smithson*, 18 Abb. (N. Y.) Pr. 237; *Millington v. Fox*, 3 Myl. & Cr. 338. Plaintiff being the proprietor of "Brown's Iron Bitters," defendant should be enjoined from printing in the place of his name on the labels of his "Iron Tonic Bitters" the words "Brown & Co., New York City," though such printing was for the accommodation of a particular dealer and was on other articles. *Brown Chemical Co. v. Frederick Stearns & Co.*, 37 F. 360.

² *Low v. Fels*, 35 F. 361.

³ *Appeal of Wilcox* (Pa.) 12 A. 578.

⁴ *Coats v. Holbrook*, 2 Sandf. (N. Y.) Ch. 586; *Taylor v. Carpenter*, 2 Sandf. Ch. (N. Y.) 603; 11 Paige, 292.

other persons from using such name and mark to denote articles similar in kind and appearance, although he may have no exclusive right of manufacturing the article. And if the use of such name and mark by another person than the first inventor has been adopted for the purpose of selling goods, whether of inferior, equal, or superior quality, though of similar external appearance, so that purchasers may be misled into the belief that they are buying the goods of the first inventor, the injury to the first inventor is one for which he is entitled to compensation in damages, and relief by injunction.¹

§ 920. **What the Complainant should set forth.** — Where, in a suit for the infringement of a trade-mark, exhibits of the devices used by both complainant and defendant accompany the bill, the court will sustain a demurrer to the bill where the exhibits show that there is no infringement.² But it is not necessary to entitle one to equitable relief against the infringement of a label or trade name that it should be alleged to be registered as, or even that it constitute, a trade-mark; and where the bill alleged that by the use of the labels complainant was enabled to receive a higher price for his cigars, and that the sale of such counterfeit labels injured his trade, it was held that, though there is no trade-mark in such labels, yet as complainant showed special damage, and that the right to use them was valuable, and as the adoption and use of such labels were in no way unlawful, and the action of defendants was confessedly fraudulent, in that they had sold the spurious labels, though they might not have used them on cigars of their own manufacture, the bill alleged good grounds for equitable relief.³

¹ *Hirst v. Denham*, L. R. 14 Eq. 542. *Injury by sale of damaged goods of complainant's manufacture.* — Where a petition by the manufacturer of a certain medicine to enjoin a person who owned a large quantity thereof, which had been in a burned building, alleged that the medicine had a large sale; that it was composed of vegetable substances, and that, by reason of the great heat to which it had been subjected, its medicinal properties were dissipated, and that the sale thereof under petitioner's trade-mark would cause great damage to petitioner's business; but failed to allege that defendant was insolvent, or to show wherein petitioner would suffer irreparable injury, or wherein the medicine had lost its virtue, — there was no abuse of discretion in denying the injunction. *Swift Specific Co. v. Jacobs*, 87 Ga. 507; 13 S. E. 643.

² *Collins Chemical & Manuf. Co. v. Capitol City Manuf. Co.*, 42 F. 64.

³ *Carson v. Ury*, 89 F. 777. Further as to proper allegations in a bill for infringing a trade-mark, see *Plant Seed Co. v. Michel Plant & Seed Co.*, 23 Mo. App. 579.

CHAPTER XXI.

MISCELLANEOUS.

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| <p>§ 921. New Uses of the Remedy of Frequent Recurrence.</p> <p>922. The State a Party Complainant.</p> <p>923. Prevention of Monopoly.</p> <p>923 a. Combination affecting Complainant's Employees.</p> <p>924. Exercise of Statutory Privilege — Non-compliance with Conditions.</p> <p>925. Foreign Government as Plaintiff in Domestic Court.</p> <p>926. Boycotting.</p> <p>926 a. Same — Mandatory Injunction.</p> | <p>§ 927. Award of Medal not enjoined.</p> <p>928. Pertaining to Performance of Public Duties as between Corporations.</p> <p>929. Interfering Electric Wires.</p> <p>930. Same — Injury to Lot-owners and Others.</p> <p>930 a. Alienation of Wife's Affections.</p> <p>930 b. Exclusion from Race-track.</p> <p>930 c. Obstruction of Interstate Commerce and Mails.</p> |
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§ 921. **New Uses of the Remedy of Frequent Recurrence.** — As was stated in the opening chapter, courts of equity have never fixed any definite bounds as regards the wrongs and abuses which they will and will not restrain by injunction. Instances of grievance and damage to property interests and personal rights are constantly arising which the dilatory and cumbersome processes of a legal form cannot reach, or can reach only after irreparable mischief is done. It is therefore not strange that the remedy should already have been resorted to in instances which, by reason of their peculiar character or of the fact that the parties usually require no equitable protection, cannot be treated under any of the recognized divisions of a work on this subject. In the use of the writ, courts exercise a sound discretion, governed by recognized principles of equity jurisprudence and regulated by analogy. It is not a fatal objection that the use of the writ for the particular purpose for which it is sought is novel.¹

§ 922. **The State a Party Complainant.** — The state being the source of all legal authority, and, through its courts, the dispenser of all remedies, equitable as well as legal, would seem to enjoy immunity from all necessity for relief in advance of threat-

¹ Nashville C. St. L. Ry. Co. v. McConnell, 82 F. 65.

ened wrong. But such is not the case; and instances have been frequent, both in England and this country, where injunctions have issued to protect the state as the guardian of public interest against nuisances, purprestures, monopolies, trespasses, abuses of franchises, and breaches of trust. Most of these have been treated in their proper connections, and it only remains to notice the principles governing courts of equity in preventing by injunction a few wrongs not susceptible of natural and obvious classification.

§ 923. **Prevention of Monopoly.** — In a proper case injunction lies at the suit of the state to restrain the operations and continuance of a combination between individuals or corporations whose object is the destruction of competition and exaction from the public of enhanced prices for commodities. Generally, however, an action *quo warranto* furnishes the state an adequate legal remedy, where the offending parties are corporations.¹ This jurisdiction with respect to railroad companies is sometimes conferred upon individuals by statute.² It is not required in such action that plaintiff should show special damage.³ But where the material allegations of a bill filed by the United States against various coal companies, under act of Congress, July 2, 1890, to enjoin their combination in restraint of trade, are denied by defendants' affidavits, a preliminary injunction will not be granted, where plaintiff gives no indemnifying bond in case the injunction should be dissolved.⁴ It was held that under Act July 2, 1890 (26 Stat. 209), declaring illegal and punishing combinations in restraint of commerce among the states, and conferring jurisdiction on United States circuit courts to prevent and restrain violations of the act, the court has jurisdiction to issue an injunction to restrain such violation.⁵ In England an individual may have a standing in court to restrain a monopoly. To warrant the court, however, in granting an interim or interlocutory injunction to restrain parties from con-

¹ See §§ 1820-1825.

² Laws N. H. 1867.

³ *Currier v. Concord R. R. Co.*, 48 N. H. 321. When an injunction will lie to restrain the consolidation of two rival steamboat companies, on the ground that such consolidation will create a monopoly such as is forbidden by N. Y. Laws 1854, ch. 232, see *Watson v. Harlem, etc. Navigation Co.*, 52 How. (N. Y.) Pr. 348.

⁴ *United States v. Jellico Mountain Coke & Coal Co.*, 43 F. 898.

⁵ *United States v. Agler*, (C. C.) 62 F. 824.

tinuing to pursue the objectionable course, those who complain must at least show that they have sustained or will sustain "irreparable damages," — that is, damage for which they cannot obtain adequate compensation without the special interference of the court.¹

§ 923 *a*. **Combinations affecting Complainant's Employees.** — A novel and, it must be admitted, an extraordinary use of the remedy has grown out of the conflicts between employers of labor and trades-unions and other labor organizations. Thus it was held that trades-unions and their "walking delegates" will be enjoined from causing the workmen of another to abandon their employment, and this though no threats were made or acts of intimidation done, and though the workmen had agreed with the unions not to accept employment from unaffiliated persons, such as plaintiff.² But an employer is not entitled to an injunction against striking employees for inducing others, by entreaty and persuasion, to leave his employment, where no intimidation is used.³

§ 924. **Exercise of Statutory Privilege — Non-compliance with Conditions.** — There may be a public wrong for which neither an indictment nor an action *quo warranto* will lie. In such case, there being an absence of all legal remedy, an injunction lies on behalf of the state, — for instance, to restrain the managers of a lottery authorized by law from proceeding with further drawings, upon the ground that statutory prerequisites to the drawings have not been complied with, or that the power granted has already been exercised and exhausted.⁴

¹ *Mogul Steamship Co. v. M'Gregor, etc.*, L. R. 15 Q. B. Div. 476.

² *Coons v. Chrystie*, 53 N. Y. S. 668. See also *Vegelahn v. Guntner*, (Mass.) 44 N. E. 1077; 167 Mass. 92; 35 L. R. A. 722.

³ *Reynolds v. Everett*, (N. Y. App.) 89 N. E. 72; 144 N. Y. 189. See *Tallman v. Gaillard*, 57 N. Y. S. 419; 27 Misc. Rep. 114.

⁴ *State v. Maury*, 2 Del. Ch. 141. See also *State v. Eddy*, Id. 269; *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions* Nos. 1 and 3, 90 F. 608; *Arthur v. Oakes*, 63 F. 310; 11 C. C. A. 209; *Consolidated Steel & Wire Co. v. Murray*, (C. C.) 80 F. 811.

PUBLISHING BLACK LIST. — In consequence of a dispute with reference to an alleged preferential employment of non-union men by a building firm, a trade-union published a poster headed "Trollope's Black List," containing the names of non-union men employed by the firm. *Held*, that, the trade-union having done more than was in fact necessary for their own protection, an interlocutory injunction was properly granted. *Trollope v. London Building Trades' Federation*, 72 Law T. 342. A court of equity having charge of a

§ 925. **Foreign Government as Plaintiff in Domestic Court.** — A somewhat anomalous case once arose in which the possibilities of the remedy as an instrument for the suppression of mischief were forcibly illustrated. It was said: "The infringement of the prerogative rights of a foreign sovereign constitutes no ground of relief in this court. If the subjects of one state infringe the prerogative of the sovereign of another state, the remedy lies in an appeal by the offended sovereign to the sovereign of the state to which the offender belongs; and if redress be unjustly refused, the refusal may be made the ground for war. The bill, so far as it is founded upon the prerogative rights of the sovereign, or upon the political rights of his subjects, was not maintainable; the plaintiff was, however, entitled to relief on the ground of the injury which might result to the private rights of his subjects by the introduction of a spurious circulation."¹

§ 926. **Boycotting.** — This wrong when accomplished by means of published matter has been previously considered.² But the acts which are so designated, and which unless restrained are calculated to cause irreparable mischief, are various and numerous. A combination by a trades-union to boycott a newspaper for refusing to unionize its office is illegal, and will be enjoined by a court of equity.³ So where defendants entered into a scheme by threats and intimidation to prevent persons in plaintiff's employ from so continuing, and in like manner to prevent

railroad through its receivers has authority to restrain the execution of a conspiracy among the employees to quit the service in a body with the intent of embarrassing the operation of the road. *Farmer's Loan & Trust Co. v. Northern Pac. R. Co.*, (C. C.) 60 F. 808; *Hagan v. Blindell*, (C. C. A.) 56 F. 696; 6 C. C. A. 86; *Elder v. Whitesides*, (C. C.) 72 F. 724; *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, (C. C.) 54 F. 746; *Murdock v. Walker*, (Pa. Sup.) 25 A. 492; *Mackall v. Ratchford*, 82 F. 41; *Longshore Printing & Pub. Co. v. Howell*, (Or.) 38 P. 547; *Hamilton-Brown Shoe Co. v. Saxey*, 131 Mo. 212.

¹ *Austria (Emperor) v. Kossuth*, 7 Jur. N. S. 639. The facts in this extraordinary case were too numerous and complicated to be set out here. They are stated fully in the report of the case, and briefly in Story's Eq. Jur. 951.

² *Supra*, § 886.

³ *Casey v. Cincinnati Typographical Union No. 3*, 45 F. 135. Compare *Rogers v. Evarts*, (Sup.) 17 N. Y. S. 264; *Manufacturers' Outlet Co. v. Longley*, (R. I.) 37 A. 535; *Barr v. Essex Trades Council*, (N. J. Ch.) 30 A. 881; *Beck v. Railway Teamsters' Protective Union* (Mich.), 77 N. W. 13; 42 L. R. A. 407; *Matthews v. Shankland*, 56 N. Y. S. 123; 25 Misc. Rep. 604; *Oxley Stave Co. v. Coopers' International Union of North America*, (C. C.) 72 F. 695.

other persons from entering his employ, and in pursuance of such scheme caused a threatening banner to be carried in front of plaintiff's shop, whose effect was to deter persons from continuing to work for or engaging with plaintiff, and the latter's business was thereby injured, it was held that plaintiff could enjoin the carrying or displaying of the banner.¹ But an injunction will not lie to restrain the publishers of a newspaper from advising and encouraging persons in the employ of others to violate their contract of employment, on the ground that the common law forbids the enticement of a servant from the employ of his master.²

§ 926 *a*. **Same — Mandatory Injunction.** — Where a labor organization has declared a boycott against a railroad, and connecting roads are therefore refusing, or seem about to refuse, to afford equal facilities to the boycotted road, in violation of section 3 of the interstate commerce act, they may be compelled to do so by mandatory injunction, since the case is urgent, the rights of the parties free from reasonable doubt, and the duty sought to be enforced is imposed by law.³

§ 927. **Award of Medal not enjoined.** — When the owners of machines have submitted them to a competitive examination and test before judges appointed by an institute for the promotion of arts and manufactures, and the judges having determined that one of such machines is entitled to a medal, showing its superiority to the others, an unsuccessful exhibitor cannot, by injunction, prevent the delivery of such medal to his rival.⁴

¹ *Sherry v. Perkins*, 147 Mass. 212; 17 N. E. 307. See *Cour d'Alene, etc. Min. Co. v. Miners' Un.*, 51 F. 260.

² *Rogers v. Evarts*, (Sup.) 17 N. Y. S. 264.

³ *Coe v. Railroad Co.*, 3 F. 775, followed; *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, (C. C.) 54 F. 746. Held in same case that a preliminary injunction may issue against the chief member of a combination to induce the officers of a common carrier corporation subject to the provisions of the interstate commerce act, and its locomotive engineers, to refuse to receive, handle, and haul interstate freight from another like common carrier, to restrain him from giving the order and signal which will result, and is intended to result, in the unlawful and irreparable injuries to the complainant; and that where such chief member has already issued such an order, the injurious effect of which will be continuing, the court may by mandatory injunction compel him to rescind the same, especially when the necessary effect of the order or signal is to induce and procure flagrant violations of an injunction previously issued by the court.

⁴ *New York Exhaust Ventilator Co. v. American Institute*, 24 Fed. Rep. 561.

§ 928. **Pertaining to Performance of Public Duties as between Corporations.** — A corporation claiming the right to furnish gas under an unconstitutional act, may be enjoined from asserting such rights where the effect of such assertion is to embarrass another company in the sale of its stock and raising means for the purpose of supplying gas.¹

A case may arise involving the duty of connecting lines of transportation to accept from each other and deliver freight. But in such case the duty must appear to be clearly obligatory by law before equity will interfere. Relief was refused because the injunction prayed must be mandatory in form if effectual; and the questions of law were unsettled in a case where the facts were as follows: The complainants, a railroad company, asked for a preliminary injunction to compel defendants, a stockyard company, to receive at their yards, from complainant, live freight carried over their road and consigned to defendants. Defendants were incorporated with full powers to carry on the business of a general stockyard and live-stock market. Complainants had no connection by rail with defendants' yards, but transferred the stock from their terminus to the yards by floats, which defendants refused to permit to land at their wharves.²

§ 929. **Interfering Electric Wires.** — Equitable jurisdiction by injunction has been frequently exercised of late for the protection of companies having a prior right to the supply of electrical forces within a given area, or along a given line, against encroachment by others calculated to draw off the current or diminish the supply. Thus, under a statute³ which provides that "an injunction shall be granted when it appears from the complaint that plaintiff demands, or is entitled to, a judgment restraining the commission of an act which, pending an action for a permanent injunction, will injure the plaintiff," it was held that on giving a bond sufficient to indemnify defendant against loss in case the suit for permanent injunction should be decided in its favor, a temporary injunction will be granted plaintiff, a corporation lawfully vested with the right to set up poles and string wires for the purpose of transmitting messages

¹ Citizens' Gas Light Co. v. Louisville Gas Co., 81 Ky. 263.

² Delaware, L. & W. R. Co. v. Central Stockyard & Transit Co., 48 N. J. Eq. 71; 10 A. 490. See Gummere v. Lehigh Val. R. Co., 12 Pa. Co. Ct. R. 106.

³ Code Civ. Proc. N. Y. 603.

by telephone, to restrain defendant from operating its electric railway, it appearing from the affidavits that the electric current passing over defendant's wires will seriously interfere with the telephone communication of plaintiff, and will temporarily deprive it of some of its patrons.¹ But in such cases the court will consider not only the question of priority of occupation, but the relative inconvenience and expense resulting to the respective parties from granting an injunction. And a telephone company cannot maintain a bill to enjoin the operation of a subsequently constructed electric railway, to prevent the disturbance of plaintiff's business occasioned by the escape of electricity from defendant's rails, which is an incidental result of the operation of the road, where the evidence tends to show that plaintiff may obviate the disturbance by the use of a single return wire on each route disturbed by the railway service to which each telephone is connected, and which operates to complete the metallic circuit, and that such device is simpler and less expensive than any the railway could adopt to effect the same end.²

§ 930. **Same — Injury to Lot Owners and Others.** — To entitle a resident owner along a street where electric wires have been or are about to be placed, to an injunction, on the ground of anticipated damage from their use of electricity, a clear case of imminent danger of irreparable injury must be made out as in other cases. Accordingly, injunction was refused where sought against an electric railway company, it being shown that although there would be some danger to men and animals from the electric

¹ Hudson River Tel. Co. v. Watervliet Turnpike & R. Co., 8 N. Y. S. 497. See also Birmingham Traction Co. v. Southern Bell Telephone & Telegraph Co., (Ala.) 24 So. 781; Rutland Electric Light Co. v. Marble City Electric Light Co., (Vt.) 26 A. 635. Compare Hudson River Tel. Co. v. Watervliet Turnpike & R. Co., 32 N. E. 148; 135 N. Y. 398. *Trolley wire for return.* — In City & Suburban Tel. Ass'n v. Cincinnati, etc., R. Co., 23 Wkly. Law Bul. 165, it appeared that a telephone company for ten years had operated through the streets of a city, using the earth for a return circuit. At the end of this time, permission was given to an electric railway company to use the streets. The railway company used a single trolley wire, and also used the earth for a return circuit. The result was that the telephone wires became charged with electricity and practically useless. Either company could obviate the difficulty by using a different system at an increased expense. *Held*, that the telephone company was entitled to an injunction.

² Cumberland Telephone & Telegraph Co. v. United Electric Ry. Co., 42 F. 278. Compare Consolidated Electric Light Co. v. People's Electric Light & Gas Co., (Ala.) 10 So. 440.

current, and from the more rapid running of the cars, and that the electric current would interfere to some extent with the telephone wires in the same street, yet no present injury was shown, or any likelihood of a future injury of a permanent or constantly recurring character.¹

§ 930 *a*. **Alienation of Wife's Affections.** — In a suit averring a cause of action for damages for the partial alienation of a wife's affections, where it was also averred that, on account of defendant's past conduct, plaintiff apprehended a continuance of the acts complained of, defendant may be restrained, to prevent the utter alienation thereof, both in equity and under Rev. St. art. 2898, providing for an injunction where it appears that the party applying therefor is entitled to the relief, or any part thereof requires the restraining of some act prejudicial to him.²

§ 930 *b*. **Exclusion from Race-track.** — A person whose occupation, as a breeder of horses, requires that he should attend the

¹ *Porter v. Saginaw Union St. Ry. Co.*, (Mich.) 47 N. W. 217. See *Barber v. Saginaw Union St. Ry. Co.*, (Mich.) 47 N. W. 219, which was also a suit to enjoin the construction and operation of an electric steel railroad. It appeared that complainant owned premises on the corner of two streets; that, at the corner diagonally opposite said premises the railroad turned from one street to the other, but that, assuming complainant's premises to extend to the middle of the streets, said railroad nowhere came within ten feet thereof. The trolley wire curved with the track, and was over the centre of it. When the suit commenced, a sustaining wire extended from the trolley wire at the curve, and was attached to a pole standing between the sidewalk and the paved street in front of complainant's lot. This pole was stayed with a wire running to a guy-post set in the ground in front of said lot. Thereafter defendant removed the wires and poles. *Held*, that a decree perpetually enjoining defendant from erecting, within the street limits, on and in front of complainant's premises, any poles, posts, or wires, for operating its cars by electricity, without complainant's consent, gave complainant all the relief she was entitled to. *Prohibitory statute construed.* — Where a statute provided that, in any city where a company is engaged in the "manufacture and sale of electric light, no other company shall lay or erect wires over or under the streets, . . . for the purpose of carrying on its business, without the consent of the mayor and aldermen," it was held, in an action for an injunction against an electric light company, that the prohibition extended to wires under the streets laid by defendant's predecessor, and now belonging to defendant; to wires put up by and belonging to defendant throughout the city, even though such wires where they cross the streets were sold to defendant's customers to evade the statute; to wires put up and owned by defendant's customers with intent to evade the statute. In such case, while the court cannot order the wires of parties not in court to be taken down, it will order defendant not to use them. *Attorney-General v. Walworth Light and Power Co.*, (Mass.) 81 N. E. 482.

² *Ex parte Warfield*, (Tex. Civ. App.) 50 S. W. 938.

various race-courses, is entitled to equitable relief against the action of racing associations by which he is wrongfully excluded from race-courses, his remedy at law being inadequate.¹

§ 930 *c.* **Obstruction of Interstate Commerce and Mails.** — A court of equity has jurisdiction to issue an injunction to prevent a forcible obstruction of interstate commerce and the transportation of the mails.² And where employees of a railroad company obstruct interstate commerce and the transmission of the mails, an injunction will issue requiring them to perform their duties while they remain in the company's employ.³

¹ *Grannan v. Westchester Racing Ass'n*, (Sup.) 44 N. Y. S. 790; 16 App. Div. 8.

² *In re Debs*, 15 S. Ct. 900; 158 U. S. 564.

³ *Southern California Ry. Co. v. Rutherford*, (C. C.) 62 F. 796.

CHAPTER XXII

INJUNCTION BONDS.

§ 931. Nature and Extent of Liability assumed.	§ 938. Relation of Undertaking to Time of issuing Writ.
932. No Particular Form required.	939. Relation to Order granting Injunction.
933. Mere Technicalities disregarded.	940. Writ not operative until Bond given.
934. When Bond excused.	941. Requiring New Bond or Additional Security.
935. Statutory Provisions.	942. Construction.
936. Estoppel by Recitals in Bond.	
937. Defect of Jurisdiction no Defence.	

§ 931. **Nature and Extent of Liability assumed.**—The liability of obligors on an injunction bond is confined to the damages and costs caused by the injunction, and adjudged on its dissolution.¹ When a suit is brought to enjoin proceedings in a suit at law, the amount of the bond is a matter resting in the discretion of the chancellor.² The general rule governing the extent of liability of sureties is that it cannot be extended by implication beyond the express terms of the bond.³ And where an injunction bond is joint as to the obligees, and joint and several as to the obligors, a joint action may be brought by the obligees, and a joint judgment rendered for the whole of their demand, although the claims due them respectively may be of different amounts and bear interest from different dates.⁴ But the general rule that equity will not enforce a bond against the rep-

¹ *Loehner v. Hill*, 17 Mo. App. 82. Liability on an injunction bond attaches upon a judgment on the merits, whether an order of dissolution has issued or not. *Fox v. Hudson*, 20 Kan. 246. See *Kleeb v. Bard*, (Wash.) 40 P. 733. See also *Jackson v. Elliott*, 100 Ala. 669; *Commissioners of Burke County v. Lumber Co.*, 114 N. C. 505.

² *New York Bank Note Co. v. Kerr*, 77 Ill. App. 53. See *Hyatt v. City of Washington*, 20 Ind. App. 148; *Smith v. Smith*, 51 S. C. 379.

³ *Tyler Min. Co. v. Last Chance Min. Co.*, 90 F. 15; 32 C. C. A. 498; *De Camp v. Bullard*, 54 N. E. 26; 159 N. Y. 450. See *Alaska Imp. Co. v. Hirsch*, 119 Cal. 249; *Gibson v. Reed*, 54 Neb. 309.

⁴ *Peerce v. Athey*, 4 W. Va. 22. See also *Wentzell v. Robinson*, 23 La. An. 451. Compare *Ovington v. Smith*, 78 Ill. 250; *Montana Mining Co. v. St. Louis Mining & Milling Co.*, (Mont.) 48 P. 305; *Wason v. Franke*, 7 Colo. App. 541.

representatives of one of two obligors, where the deceased obligor was but a surety for the other, applies to an injunction bond executed under a statute which provides that no injunction shall issue to stay the trial of a pending action until the party applying therefor shall execute a bond "with one or more sufficient sureties," conditioned for the payment of whatever sum the plaintiff may recover, — the fair intendment of such a statute being that the obligor may be heard as to whether the bond shall be joint, or joint and several.¹

§ 932. **No Particular Form required.** — While no intendments will be annexed to the clear expressions of an injunction bond, yet mere matters of form will be disregarded where from what appears the extent of the undertaking by the obligors can be determined with reasonable certainty, provided statutory requirements as to the form and terms of the bond have been observed.² But only those who sign the undertaking for damages caused by an injunction are liable upon it. If the plaintiff in the injunction suit does not sign the undertaking, he cannot be charged upon it by a reference to compute damages, but can only be proceeded against by action.³ On the other hand an injunction bond may be sufficient, although not signed by the plaintiff.⁴ And a bond executed by the plaintiffs, in an action against

¹ *Pickergill v. Lahens*, 15 Wall. 140.

² See *Noble v. Arnold*, 23 Ohio St. 264; *Parker v. Boyd* (Tex. Civ. App.), 42 S. W. 1031; *Alaska Imp. Co. v. Hirsch*, 119 Cal. 249; *Barrett v. Bowers*, 32 A. 871; 87 Me. 185; *Hyatt v. City of Washington*, (Ind.) 50 N. E. 402. A condition in an injunction bond to pay the obligees "all damages they may sustain by the suing out of said injunction, if the same is dissolved, then this obligation to remain in full force and effect," though awkward, — *held*, not to avoid the bond. *Washington v. Timberlake*, 74 Ala. 259. S. C. Stat. 1784 requires the bond of a person applying for a stay of execution by injunction to be taken in the name of the plaintiff. A master on granting an injunction took a bond payable to himself and his successors in office and then assigned the bond to the plaintiff. *Held*, that the bond was good and that the assignees could sue on it. *Cay v. Galliot*, 4 Strobb. (S. C.) 282. Under N. Y. Code, §§ 182 and 222, — directing the judge issuing an order of arrest or an injunction to require an undertaking "on the part of the plaintiff, with or without sureties," — it is competent for him to accept a single surety. In other cases the number of sureties is specified; but on arrest (as well as on injunction under § 222, which contains the same words), it is discretionary to require none at all, or one, or more. The only restriction is as to the form of the security. *Courter v. McNamara*, 9 How. (N. Y.) Pr. 255.

³ *Patterson v. Bloomer*, 9 Abb. (N. Y.) Pr. n. s. 27.

⁴ *Pence v. Durbin*, 1 Idaho, n. s. 550; *State v. Eggleston*, 34 Kan. 714.

several defendants to obtain a temporary injunction, inures to the benefit of all the defendants, though in its terms it is executed to but one of them.¹

Under an order requiring the party suing out an injunction to give bond, conditioned to pay all such costs and damages as may be awarded should the injunction be dissolved, a bond, conditioned to pay any decree or order that may be awarded all costs or damages incurred or sustained if the injunction be dissolved, though more onerous in its terms than required by the order, is a valid common law bond.²

§ 933. **Mere Technicalities disregarded.** — An injunction bond will not be held so far defective as to prevent recovery thereon by reason of mere informalities and non-compliance with unimportant preliminaries, whether prescribed by statute or order of the court.³ The approval of the court need not be indorsed upon the injunction bond; nor need the name of the surety appear in the body of the bond,⁴ or the names of all the defendants.⁵

A party ought to be allowed a reasonable time after his attention is called to the defect in the bond, by rule or notice, within which to execute a proper bond; and on his failure to do so the injunction ought to be dismissed.⁶

§ 934. **Where Bond excused.** — It is not necessary to file a bond, on granting a decree for a perpetual injunction, where no interlocutory injunction was sought or granted.⁷ It was held under the earlier Maryland statutes that an injunction may be

¹ *Boden v. Dill*, 58 Ind. 273; *Dry Dock, etc. R. R. Co. v. Cunningham*, 45 How. (N. Y.) Pr. 458. Under a peculiar injunction bond, undertaking to pay all the obligees jointly, — *held*, that no damages could be recovered, save such as were sustained by all the obligees. *Rees v. Peltzer*, 1 Ill. App. 315.

² *State v. Purcell*, 31 W. Va. 44; 5 S. E. 801.

³ *Wanless v. West Chicago St. R. Co.*, 77 Ill. App. 120; *Lee v. Watson*, (Mont.) 38 P. 1077; *Bochner v. Automatic Time Stamp Co.*, 80 Ill. App. 27. Where a number of defendants filed separate motions to dissolve an injunction, which were set for hearing and submitted at the same time, when the injunction was dissolved as to all, the fact that the order of dissolution was entered as if made upon one of the motions will not prevent the other defendants from recovering upon the injunction bond such damages as were actually sustained. *Mulvane v. Tullock*, 50 P. 897; 58 Kan. 622.

⁴ *Griffin v. Wallace*, 68 Ind. 70.

⁵ *Hopkins v. State*, 53 Md. 502.

⁶ *Chesapeake, etc. R. R. Co. v. Patton*, 5 W. Va. 284.

⁷ *Lake Erie & W. R. Co. v. Cluggish*, (Ind. Sup.) 42 N. E. 748; 143 Ind. 347.

granted to stay execution at law in some cases, without requiring an injunction bond to be given;¹ and in South Carolina under a statute providing that, where no provision is made by statute as to security on injunction, the judge shall require a bond with or without sureties, it cannot be assigned as error that non-resident plaintiffs were permitted to give bond without sureties.² A suit instituted in a court of another state, upon a judgment recovered in New Jersey, is not within the prohibition of the New Jersey chancery act, that no injunction shall issue to stay proceedings at law in any personal action after verdict or judgment on the application of a defendant in such proceedings at law unless a deposit is made or a bond given.³ And it was held that under the Georgia statute permitting plaintiff in an application for an injunction to prevent the cutting of timber to attach to his petition an abstract of his title, and give a bond for damages when the restraining order is granted, was not applicable in a case where plaintiff alleged and proved the insolvency of defendant.⁴ And where a defendant had made no objection during six years to the omission of the complainant, who had obtained an injunction against him, to give bond to indemnify him against loss, it was held that the defendant had waived the irregularity.⁵

§ 935. **Statutory Provisions.** — The requirements as to giving bonds by plaintiffs in injunction suits are largely statutory; and where the duty of requiring bond with security is imposed, the court has no power to dispense with the security required by the statute.⁶

¹ Cape Sable Company's Case, 3 Bland (Md.), 606.

² Meinhard v. Strickland, 29 S. C. 491; 7 S. E. 838.

³ Cairo, etc. R. R. Co. v. Titus, 26 N. J. Eq. 94.

⁴ Smith v. Smith, (Ga.) 31 S. E. 135. An injunction to restrain a forced sale of property claimed to be exempt under the constitution is not an injunction to stay a proceeding at law, within the statute prohibiting the granting of injunctions for that purpose without the giving of bond. Smith v. Gufford, 18 So. 717; 36 Fla. 481.

⁵ Howze v. Green, Phill. (N. C.) Eq. 250. *Exhaustion of principal unnecessary.* — A suit against the principal is not necessary to determine the liability of the sureties upon an injunction bond. The plaintiff is not obliged to exhaust other remedies before proceeding against the surety. Dangel v. Levy, 1 Idaho, n. s. 722.

⁶ Hunt v. Smith, 1 Rich. (S. C.) Eq. 277. See Appeal of Wheeling, (Pa.) 3 A. 12; Macon & B. R. Co. v. Stamps, (Ga.) 11 S. E. 442; Cooper v. Tappan, 4 Wis. 362; Cairo, etc. Railroad Company v. Titus, 26 N. J. Eq. 94; Erie, etc. R. R. Co. v. Casey, 26 Pa. St. 287; Meinhard v. Youngblood, (S. C.) 15 S. E. 947; Hinkle v. Baldwin, (Mich.) 53 N. W. 534; 93 Mich. 422; Stock-

But an exception is frequently made in such statutes in favor of executors and other fiduciaries.¹

Although the conditions of an injunction bond are not so extensive as the statute requires, yet, if it contains a material part of the condition required, the bond is not void, but binds the obligors to the extent of such condition or conditions; and where the bond contains some conditions or promises not required by the statute, and some of those required, it is valid and binding to the extent of the latter.²

§ 936. **Estoppel by Recitals in Bond.** — In a suit on a bond given for an injunction against the further prosecution of a suit therein recited, the obligors are estopped from denying that there

ton v. Harmon, 18 So. 838; 32 Fla. 312; Corbin v. Casina Land Co., 49 N. Y. S. 929; 26 App. Div. 408; State v. Green, 48 Neb. 327; Wilson v. Featherstone, (N. C.) 27 S. E. 121; 120 N. C. 449; Code Proc. § 273, providing that no injunction shall be granted until the petitioning party shall enter into a bond, applies to a petition by a receiver. Cherry v. Western Washington Industrial Exposition Co., (Wash.) 40 P. 136. The requirement of Cal. Code, 529, for a written undertaking on the part of the plaintiff procuring an injunction, is imperative, whether it be granted *ex parte*, or upon an order to show cause. McCracker v. Harris, 54 Cal. 81. Requisites of an undertaking of an injunction, under Neb. Gen. St. 255, 567. Smith v. Gregg, 9 Neb. 212. Requisites and sufficiency of a bond given on applying for an injunction, under the Virginia practice, — determined, in a case involving the correctness of the attestation, and the proper amount of the penalty. Harman v. Howe, 27 Grat. (Va.) 676. The requirement in the N. C. Civil Code, § 192, is only directory; and an injunction bond is not void because it specifies no amount in which the signers are bound. The damages may be ascertained by references or otherwise, as the judge shall direct. North Carolina Gold Amalgamating Company v. North Carolina Ore Dressing Company, 79 N. C. 48. It is not necessary that a judgment creditor of an insolvent corporation, who brings suit for an injunction, under 2 N. Y. Rev. Stat. 466, to restrain other creditors of the corporation from proceeding at law, and for the appointment of a receiver and equitable distribution of the corporate assets, should give the bond or make the deposit prescribed by 2 Rev. Stat. 188, § 139, respecting injunctions to stay proceedings at law. Hutchinson v. N. Y. Central Mills, 2 Abb. (N. Y.) Pr. 394. The failure to give the undertaking required on the issue of a temporary injunction (Code Civ. Proc. § 620) is a mere irregularity, which can be cured *nunc pro tunc*. Manley v. Leggett, (Sup.) 17 N. Y. S. 68.

¹ See Lomax v. Picot, 2 Rand. (Va.) 247.

² Holliday v. Myers, 11 W. Va. 276. See also Rubelman Hardware Co. v. Greve, 18 Mo. App. 6. Where an injunction bond was conditioned for the payment of more than the statute required, — *held*, that there could be no recovery thereon beyond what could have been recovered if the bond had conformed to the statute. Menken v. Frank, 57 Miss. 732. The statute which continues a levy in force after injunction is merely for the execution of plaintiff's additional security, and does not change the legal effect of the injunction bond. Pugh v. White, 78 Ky. 210.

was a suit pending.¹ And in Louisiana sureties are held estopped by the allegations in the petition.²

§ 937. **Defect of Jurisdiction no Defence.** — Where the principal obtains the benefit of delay by the injunction, neither he nor his sureties will be discharged from the obligation of the bond by reason of the want of authority of the judge making the *fiat*, although in such a case it might be necessary to sue upon the bond as a common law obligation.³ Upon dissolving a preliminary injunction which is void for want of jurisdiction in the court which assumed to grant it, to allow damages is improper; for the injunction has not, in law, restrained the party. But a reasonable attorney's fee may be allowed.⁴ But where a special injunction was granted by a commissioner, requiring a defendant in equity to give bond not to remove a slave, on condition that the plaintiff in equity should give bond to pay all damages the defendant might sustain, in case of the plaintiff's failure in his bill, it was held that the bond given by the plaintiff was void, the commissioner having no authority to require him to give such bond.⁵

§ 938. **Relation of Undertaking to Time of issuing Writ.** — A bond "to pay to the defendant in injunction all such damages as he may recover against the obligors, in case it be decided that said writ of injunction was wrongfully issued," though given after injunction issued, will cover past as well as future damages. Such bond is actionable against the surety together with the principals without preliminary suit against the principals, on proof of condition broken.⁶ But where an order is made that

¹ *Person v. Thornton*, 86 Ala. 308; 5 So. 470. The bond reciting the pendency of the proceedings in which the injunction was ordered, the obligee could not deny the existence and effect of the injunction. *Le Strange v. State*, 58 Md. 26.

² *Green v. Huey*, 23 La. An. 704.

³ *Adams v. Olive*, 57 Ala. 249.

⁴ *Joslyn v. Dickerson*, 71 Ill. 25. Where, pending a suit in chancery by trustees, their powers are vacated and new trustees are appointed, even if the court can change the plaintiffs after answer filed upon terms, it cannot vacate the injunction bond given by the former, and direct another to be executed without notice to the defendants, that they may show cause against the motion. *Galt v. Carter*, 6 Munf. (Va.) 245.

⁵ *Fant v. Martin*, 10 Rich. (S. C.) 428.

⁶ *Block v. Myers*, 35 La. An. 220. Obedience to the writ of injunction is not a condition to a recovery on a bond. *Van Hoover v. Van Hoover*, 18 Mo. App. 19.

an injunction issue on the filing of a bond, and the bond recites that it is given in consideration that the said writ of injunction may issue, but the injunction is issued and served before bond is given, the sureties on the bond are not liable.¹

§ 939. **Relation to Order of Court granting Injunction.** — A surety in an injunction bond which recited that the injunction was ordered to be issued "on the complainant's filing with the clerk of the court a bond executed by himself and a surety or sureties," cannot, in an action against himself on the bond, object to its admissibility in evidence, on the ground that it does not appear that the order granting the injunction required a bond to be given. Having signed and sealed the bond, he is estopped from denying it.²

§ 940. **Writ not operative until Bond given.** — An order conditionally granting an injunction is not operative until a bond is filed in conformity with law and the order of the court or judge granting the same.³ Nor where a temporary injunction has never been operative, owing to the failure to give the undertak-

¹ *Carter v. Mulrein*, 82 Cal. 167; 22 P. 1086. Upon the commencement of a suit the bill praying for an injunction pending the hearing, which on final hearing should be made perpetual, the court granted an order to show cause why the temporary injunction should not be granted as prayed for, and also ordered that the defendants be restrained from committing the acts until the decision upon said motion; said preliminary order to take effect upon the execution of a bond conditioned to pay such damages as defendant might sustain by reason of said restraining order. A bond was executed reciting the filing of the complaint, conditioned as follows: "In consideration of the premises, and of the issuing of said writ of injunction," the parties promise "that, in case said writ shall issue," they will pay damages, etc. Upon the motion to show cause the bill was dismissed for want of jurisdiction. *Held*, that the injunction for which the bond was given was not the writ directed to be issued by the preliminary order, and that no action could be maintained on the bond. *Byam v. Cashman*, 78 Cal. 525; 21 P. 113. See *Lambert v. Haskell*, 80 Cal. 611; 22 P. 327.

² *Hamilton v. State*, 32 Md. 348. Where an injunction is granted upon the "usual terms" to restrain proceedings on a judgment at law, such proceedings will not be stayed thereby until the complainant has given bond with surety. *Clarke v. Hoopes*, 2 Hen. & M. (Va.) 23. The direction as to the giving of the undertaking required by Code Civil Proc. § 620 need not be embodied in the injunction order, there being no statute requiring it. *Manley v. Leggett*, (Sup.) 17 N. Y. S. 68.

³ *Van Fleet v. Stout*, (Kan.) 24 P. 960. See also *Lawton v. Richardson*, (Mich.) 72 N. W. 988; *Alaska Imp. Co. v. Hirsch*, 51 P. 340; *Rutan v. Lagonda Nat. Bank*, 72 Ill. App. 35; *Pendleton v. Laub*, (Iowa) 64 N. W. 653; *Smith v. Smith*, (S. C.) 29 S. E. 227; *Staffords v. King*, 90 F. 136; 32 C. C. A. 536; *State v. King*, (La.) 16 So. 805; 47 La. Ann. 229.

ing required by statute, does the giving of a supersedeas bond, upon the dismissal of the suit by the court, give the order of injunction any validity.¹ But the failure of one party, who has joined with another in an application to restrain a nuisance, to perfect the injunction by giving bond, does not destroy the right of each other to the benefit of the injunction, when he has himself given bond.² Nor is the validity of an injunction affected by a failure to require an indemnity bond to accompany it; nor is a party for that reason justified in disobeying the mandate, but if aggrieved his remedy is by a motion to dissolve.³

§ 941. **Requiring New Bond or Additional Security.** — Where the security given for obtaining an injunction is not sufficient, further security will be ordered.⁴ So where one of the sureties on an injunction bond has become insolvent the remedy is by an order directing that the injunction be dissolved unless the plaintiff file a new undertaking within a specified period.⁵ And in the federal court a certified check may be accepted by the court in lieu of an injunction bond, and this, even after the injunction ordered has been dissolved for want of sufficient bond.⁶ But where an undertaking has been given before the issue of a restraining order, the court need not, on the return of the order to show cause, require a new undertaking, upon continuance of the injunction to trial, when no reason is shown why the bond already given is not sufficient.⁷ Nor, after an order of the supe-

¹ *State v. Green*, (Neb.) 67 N. W. 162.

² *State v. King*, (La.) 14 So. 428; 46 La. Ann. 78. See also *Meinhard v. Youngblood*, 87 S. C. 228; *Preiss v. Cohen*, 112 N. C. 278; *Stone v. Keller*, 4 Ind. App. 486.

³ *Young v. Rollins*, 90 N. C. 125.

⁴ *Moredock v. Williams*, 1 Overt. (Tenn.) 325; *Ross v. Pleasants*, 1 Hen. & M. (Va.) 1; *Goldmark v. Kreling*, 25 Fed. Rep. 349. In the absence of abuse or denial of justice the act of a judge in raising the amount of a bond for injunction will not be interfered with on appeal. *Bell v. Riggs*, 87 La. An. 813. Upon an order of the court refusing a motion to dissolve an injunction for insufficiency of the original bond, — *held*, that the amended bond would be presumed to be properly upon the files, even in the absence of any order expressly granting leave for it to be filed. *Farni v. Tesson*, 51 Ill. 393.

⁵ *Randall v. Carpenter*, 22 Hun (N. Y.), 571. Where one of two sureties in an undertaking given on an injunction or on an order modifying it, becomes insolvent, if in such case the bond without the insolvent surety would have sufficed, it may be treated as still sufficient. It is a question of judicial discretion in each instance. *Willett v. Stringer*, 15 How. (N. Y.) Pr. 310.

⁶ *Goldmark v. Kreling*, 25 Fed. Rep. 349.

⁷ *Preiss v. Cohen*, (N. C.) 17 S. E. 520. See also *San Reno Hotel Co. v. Brennan*, 64 Hun, 607.

rior court dissolving the injunction granted to plaintiffs upon their giving bond in a specified sum, from which order the plaintiffs appeal, has the judge of the superior court any power, on the application of the defendant, to order the plaintiffs to increase the penalty of the original bond, or annex thereto another bond.¹ The power to grant injunction in vacation, and require bond to be then given, carries with it the right to require a new bond with an enlarged penalty, and the order of the court should be that, after a time fixed by the court, the injunction shall be dissolved "until such bond is given."²

§ 942. **Construction.** — The obligee as well as the obligor in an injunction bond may claim to stand upon the precise terms of the bond.³ And a bond executed in a proceeding to obtain an injunction providing "for the payment of all damages and costs" sustained by the obligee by reason of such injunction, "should the same be wrongful," has but one condition, which is that the injunction should be wrongful.⁴ The terms of an undertaking for an injunction are construed by the statutes in force at the time of giving the same; and such statutes govern as to the liability of the sureties thereon.⁵

¹ *French v. City of Wilmington*, 75 N. C. 387. Where an injunction restraining the defendant from moving a vessel in his possession had been granted on insufficient security, — *held*, that it should be modified so as to permit him to use it within the state. *Gurnee v. Odell*, 18 Abb. (N. Y.) Pr. 264.

² *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396. *Remedy on new or last bond.* — An injunction bond was adjudged not to be good because of the insolvency of the only surety on it, and a second bond was given, but the clerk's name was not signed to it; a third bond was given with the same names as the first and second bonds, and two additional names. The penalties of all the bonds were the same. *Held*, that the parties to the last bond were the ones who were liable for the penalty of the bond for the wrongfully suing out of the injunction. *Odell v. Henry*, 8 Baxter, (Tenn.) 218.

³ *Somerville v. Mayes*, 54 Miss. 81. The undertaking of a surety on an injunction bond must be strictly construed; he is not liable beyond the precise terms of his undertaking. *Ovington v. Smith*, 78 Ill. 250.

⁴ *Boden v. Dill*, 58 Ind. 278.

⁵ *Krug v. Bishop*, 44 Ohio St. 221; 6 N. E. 252. See *Alaska Imp. Co. v. Hirsch*, (Cal.) 47 P. 124; *Yates v. Mead*, 18 So. 695; 69 Miss. 473; *New York Security and Trust Co. v. Lipman*, (Sup.) 32 N. Y. S. 65; 83 Hun, 569. An order continuing an injunction pending appeal continues the injunction bond already executed. *Davis v. Connolly*, (Ky.) 46 S. W. 679. A bond given to secure a restraining order will not give effect to a temporary injunction subsequently allowed in the same case. *State v. Green*, (Neb.) 67 N. W. 162. An injunction, wrongfully issued, having been framed in ambiguous terms, defendant is entitled to such damages as he may have sustained by obeying it, as he

reasonably and in good faith understood it. *Webb v. Laird*, (Vt.) 20 A. 599. Civil Code Cal. 2837, provides that in interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts. Section 1643 requires that a contract be interpreted so as to make it capable of being carried into effect, if it can be done without violating the intention of the parties. *Held*, that as no undertaking can be required on final injunction, Code Civil Proc. providing only for undertakings on preliminary injunctions, the words "shall issue," in an undertaking given on the issuance of a preliminary injunction, conditioned "in case said injunction shall issue," must be construed under these code provisions as meaning, "shall be construed in force." *Lambert v. Haskell*, 80 Cal. 611; 22 P. 827. The statutory rule that, to stay the collection of a judgment, the injunction bond must be for double the amount of the judgment, has no application where only the sale of certain property is sought to be enjoined. *Hardin v. White*, 63 Iowa, 633. *In federal court*. — Under an order of the United States district court that a bond be given by plaintiffs "to save the parties harmless from the effects of the injunction issued in this cause," a bond was given, conditioned to pay "to the said — defendant in said injunction all such damages as he may recover against us, in case it should be decided that the said writ of injunction was wrongfully issued." *Held*, that the bond should be construed to mean that such damages would be paid as the obligee should recover by a suit *on the bond itself*, and that, thus construed, the bond was valid and conformable to the order, and covered all damages arising from the wrongful issue of the injunction. *Meyers v. Block*, 120 U. S. 206; 7 S. Ct. 525. *Terms of bond too broad*. — An order vacating an injunction restraining defendants from interfering with a party wall, required defendants, in case plaintiff tendered them a license to shore up the wall, to give a bond conditioned for the payment "of such damages, if any, including loss of rents, if any, as plaintiff may sustain," etc. *Held*, that the condition of the bond was too broad, as, in effect, it adjudged defendants liable for all injuries sustained by plaintiff, whether they give rise to a legal claim or not, and that defendants should have been required only to secure plaintiff for any injuries she might sustain for which defendants might be liable. *Wynkoop v. Van Beuren*, 11 N. Y. S. 879.

CHAPTER XXIII.

DAMAGES UPON DISSOLUTION.

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| <p>§ 943. General Principles applicable.</p> <p>944. Same — Claims allowable.</p> <p>945. Same — Claims not allowable.</p> <p>946. Loss of Profits in Business.</p> <p>947. Loss of Time and Wages.</p> <p>948. Measure of Damages.</p> <p>949. Same — Use of Property.</p> <p>950. Same — Dividends — Sale of Exemption.</p> <p>951. Where Judgment enjoined.</p> <p>952. Costs and Expenses of Litigation.</p> <p>953. Counsel Fees — General Rule.</p> <p>954. Counsel Fees in Federal Courts.</p> <p>955. Same — Unpaid Fees — Value — County liable.</p> <p>956. Not recoverable unless Injunction improperly granted.</p> | <p>§ 957. Stage of Proceedings at which Damages recoverable — General Rule.</p> <p>958. Same — Amendment — Appeal — Collateral Undertaking.</p> <p>959. Reference to compute Damages.</p> <p>960. Remedy by Separate Action.</p> <p>961. Compliance with Conditions.</p> <p>962. Extent of Recovery against Surety.</p> <p>963. Same — Pendency of Appeal.</p> <p>964. Damages for maliciously instituting Injunction Suit.</p> <p>965. Defences not allowable.</p> <p>966. Same Subject.</p> <p>967. Evidence in Mitigation.</p> <p>968. Rule where Injunction merely ancillary to other Relief.</p> <p>969. Proof of Counsel Fees.</p> |
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§ 943. General Principles applicable. — The rule that no damages are to be allowed which are not the actual, natural, and proximate result of the wrong committed, is applied in an action on an injunction bond.¹ In such action the plaintiff is not enti-

¹ *Streeter v. Marshall, etc. Min. Co.*, 4 Colo. 535. Where it was held that money alleged to have been paid for the expenses of men to watch or hold the mine in question, against other than the defendants, could not be recovered. *Foster v. Stafford Bank*, 58 Vt. 658; *Riggs v. Bell*, 42 La. An. 666; 7 So. 787; *Center v. Hoag*, 52 Vt. 401. Where, by ordinary efforts, an injunction defendant accomplished the object sought to be enjoined before the writ was served, — *held*, he could not claim he was delayed by the injunction and recover damages therefor. *Ford v. Loomis*, 62 Iowa, 586. *Loss of profits from cutting timber.* — A life tenant was enjoined from cutting wood except for firewood, fencing, and ordinary repairs. The injunction was modified afterwards so as to permit him to cut except in so far as his cutting would constitute waste. *Held*, in his suit in the injunction bond that he was entitled to damages suffered from being restrained from cutting such wood as, but for the injunction, he might lawfully have cut, but not for damages claimed to have resulted from his having forbore to cut after the modification of the injunction, his forbearance arising from fear of violating it. *Lillie v. Lillie*, 55 Vt. 470. *Special train.* — The expense incurred in hiring a special train to reach

tled to any consequential or speculative damages, but only such as flow directly from the injunction, or are its immediate consequences;¹ for instance, reasonable counsel fees and expenses, and disbursements made or incurred in obtaining a final decision that plaintiff was not entitled to an injunction.² The limit of liability upon an undertaking given upon the issuing of an injunction is the amount specified therein; and the court has no power to make any allowance beyond that amount for disbursements.³ Remote damages are excluded by the very terms of the undertaking, which are, that the plaintiff will pay to the defendant "such damages as he may sustain by reason of the said injunction," and also by the general rules of law governing the assessment of damages in analogous cases.⁴

a judge to make an application to dissolve an injunction, may be allowed as damages on the undertaking, where large interests would have suffered from delay. *Crounse v. Syracuse, Chenango, etc. R. R. Co.*, 82 Hun (N. Y.), 497. *Party wall.* — The proper damages for a temporary injunction restraining the defendant from tearing down an alleged party wall, in preparing to erect a new building, — *held*, to be, firstly, loss in rent; secondly, increased cost in building; thirdly, counsel fees on motion to dissolve, and on appeal from the order of dissolution. *Roberts v. White*, 78 N. Y. 375.

¹ *Sensenig v. Parry*, 113 Pa. St. 115; 5 A. 11. One procuring an injunction cannot recover for damages caused him by the other party's rightful obedience to it. *Webb v. Laird*, 59 Vt. 108; 7 A. 465; s. c. 20 A. 599.

² *Hovey v. Rubber, etc. Co.*, 35 N. Y. Superior Ct. 81.

³ *Lawton v. Green*, 64 N. Y. 326.

⁴ *Hotchkiss v. Platt*, 15 N. Y. Supreme Ct. 46. An injunction, wrongfully issued, having been framed in ambiguous terms, defendant is entitled to such damages as he may have obtained by obeying it, as he reasonably and in good faith understood it. *Webb v. Laird*, (Vt.) 20 A. 599. *Nominal damages.* — Nominal damages cannot be recovered upon an injunction bond, where no actual damages have been sustained. *Foster v. Stafford Nat. Bank*, 58 Vt. 658; 5 A. 890; *Busement v. Stewart*, 55 Cal. 115. On the other hand, though actual damages have been sustained, if no estimate of the amount of damages suffered is given in evidence, only nominal damages can be assessed. *Rohwer v. Chadwick*, (Utah) 26 P. 1116. In an action on an injunction bond to recover damages for loss of plaintiff's crops by reason of his being restrained from using the water in a certain ditch, the evidence showed that there was a scarcity of water, and that it could not have reached plaintiff's land. There was a verdict for defendant, and the court, with his consent, entered judgment for nominal damages for plaintiff. *Held*, that the verdict would not be disturbed. *Mack v. Jackson*, 9 Colo. 536; 13 P. 542. *Reference fees.* — On a reference to ascertain the damages sustained in consequence of an injunction order forbidding the legal foreclosure of a mortgage, the costs of the reference are properly allowed as part of the damages. *Holcomb v. Rice*, (N. Y.) 23 N. E. 1112; 119 N. Y. 598. As to interest on mortgage, see *Foster v. Goodrich*, 127 Mass. 176.

§ 944. **Same — Claims allowable.** — Rents lost by the mortgagee pending an injunction against his sale are recoverable as damages.¹ But no damages can be recovered by plaintiff for having been kept out of possession of the property by the injunction. There having been no sale under the first execution, it cannot be certain that the plaintiff would have been the purchaser and entitled to the possession.² Depreciation resulting from a delay in the sale of personal property, caused by an injunction, is "occasioned by" the injunction.³ And loss of debts barred by the statute of limitations pending the injunction, and including losses caused by the neglect of a receiver to perform his duty, may be recovered, notwithstanding the defendant in the injunction suit consented to the appointment of the negligent receiver, unless he also consented to his not giving security, his insolvency causing the loss.⁴ So where one who has procured materials for the purpose of doing certain work is enjoined from doing it, and by reason of the injunction the materials are lost or destroyed, he may recover their value in a suit on the injunction bond.⁵ But gains which but for the injunction might have been realized from a contract with a third party, and which but for the injunction might have been carried out and yielded a profit, are too uncertain, doubtful, and remote, to be considered

¹ *Holthus v. Hart*, 9 Mo. App. 1. Compare *Colby v. Meservey*, (Iowa) 52 N. W. 499.

² *Johnston v. Moser*, 72 Iowa, 654; 84 N. W. 459. In an action on an injunction bond for costs alleged to have been incurred in obtaining a dissolution of the injunction, it appeared that plaintiff was proceeding to sell certain lands under a decree of foreclosure, when defendant, claiming to be the owner of the lands under a tax-deed, brought an action to enjoin the sale and to quiet his title, and filed the bond sued on. *Held*, that the claim of plaintiff for the value of the use of the land for the time he was kept out of possession, or interest on the sum for which he would have bid it in at the sale, depends on contingencies which cannot be known, and should not be allowed. *Bullard v. Harkness*, (Iowa) 49 N. W. 855. *Working-animals — depreciation.* — The principal and the security on an injunction bond, and on a forthcoming bond, by means of which the principal arrested the sale, and obtained the possession, and enjoyed the use of working-animals seized by a party, will be held *in solido* for the depreciation in value of said animals as a result of bad treatment while in the possession of the principal on such bonds. *Lallande v. Trezevant*, 39 La. An. 830; 2 So. 578.

³ *Meysenburg v. Schlieper*, 48 Mo. 436.

⁴ *Terrell v. Ingersoll*, 10 Lea (Tenn.), 77.

⁵ *Dougherty v. Dore*, 63 Cal. 170. Loss for tollage on logs allowed. *De Camp v. Burns*, 53 N. Y. S. 1035; 33 App. Div. 517.

as an element of damage.¹ A sum due, but not paid, may, however, be allowed as damages on the undertaking given upon obtaining an injunction.² And where the conditions of the injunction bond are sufficient to cover any damages for waste committed during the pendency of the injunction, the inquiry of the court on the assessment of damages should be extended to any waste or destruction of property.³

§ 945. **Same — Claims not allowable.** — A defendant is not entitled to recover compensation for the time and service he may have devoted to the case, nor is he entitled to compensation for the mental strain and anxiety he may have suffered in consequence of the injunction.⁴ And on the dissolution of an injunction restraining the prosecution of suits for rent, it is error to assess as damages the amount of rent involved in such suits, in the absence of evidence showing that the rents became lost by reason of the injunction.⁵ On the same general principle where the sale of an insolvent's stock of goods by his trustee was enjoined, and a receiver appointed, the sureties on the injunction bond are not liable for losses resulting from the appointment of the receiver and the sale of the property by him.⁶ Nor can de-

¹ *Livingston v. Exum*, 19 S. C. 223. On dissolution of an injunction arresting an order of seizure and sale, damages cannot be allowed. *Boyer v. Joffrion*, (La.) 4 So. 872. Defendant is not entitled to damages for the suing out of an injunction where plaintiff has a lien on the property which defendant was enjoined from selling. *Parks v. O'Connor*, 70 Tex. 377; 8 S. W. 104. In a suit on an injunction bond, not only the penal sum may be recovered, but interest from the date of the breach. *Perry v. Horn*, 22 W. Va. 381.

² *Crounse v. Syracuse, Chenango, etc. R. R. Co.*, 32 Hun (N. Y.), 497. *Different claimants to trust fund.* — Where an injunction bond is given in a controversy to settle the rights to a fund, one who held, and who continues to hold, the legal title to the fund, may recover on the bond at law to the full extent of the damages touching the entire fund, and where there are others equitably interested, equity will distribute the proceeds according to their several rights. *Oelrichs v. Spain*, 15 Wall. 211.

³ *Hayden's Adm'rs v. Phillips' Adm'r*, (Ky.) 11 S. W. 921.

⁴ *Cook v. Chapman*, 41 N. J. Eq. 152; 2 A. 286.

⁵ *Rosenthal v. Boas*, 27 Ill. App. 430. Under §§ 3763-3766, Gen. St. Ky., allowing the court to assess damages upon the dissolution of an injunction to stay proceedings upon a judgment or to delay the delivery of property, no right to damages accrues to a lessee ousted from possession for failure to pay rent, the term of whose lease expires before the date of the hearing at which the dissolution of an injunction, issued to restrain him from annoying the lessor with continual trespasses, was granted. *Morrow v. Wessell*, (Ky.) 2 S. W. 251. One of the obligees in the bond may maintain a separate action for being kept out of his property. *White v. Bowman*, 10 Lea (Tenn.), 55.

⁶ *Wood v. Hollander*, (Tex. Sup.) 19 S. W. 551.

fendant recover for the expense of feeding teams which remained idle, where there is no evidence that diligence was used in attempting to find employment for them.¹ And in a suit on an injunction bond, the complaint must allege special damages or they cannot be proven.²

§ 946. **Loss of Profits in Business.** — Plaintiff in an action on an injunction bond can recover for profits which he would have made had he not been prevented by the injunction from carrying on his business.³ But it is frequently very difficult to ascertain what allowance a party enjoined from continuing his business is entitled to recover on that account; and where, on a reference to ascertain the damages caused by an injunction suspending the defendant's business of manufacturing toys, the referee allowed damages sustained by loss of profits, based on testimony that the profits of the business over and above its expenses were twenty-five per cent, and that during the life of the injunction defendant was prevented from doing a certain amount of work in gross, on orders received, but made no allowance for contingencies of business, certainty of sales, and bad, uncollectible debts, it was held that the assessment of damages should be set aside.⁴ The rule that one's recovery is confined to profits in an established business is applicable in these cases. Thus, where the extension of a horse railway track was enjoined, it was held that

¹ *Nansemond Timber Co. v. Rountree*, (N. C.) 29 S. E. 61.

² *Parker v. Bond*, 5 Mont. 1; *Wood v. Hollander*, (Tex.) 19 S. W. 551. In an action on an injunction bond, given in a proceeding to restrain a railway company from building its road across certain lands, where the only evidence of damage to the company on account of the delay is that at the time the injunction issued it had a force of hands engaged in constructing the road, which continued at work for two days after the writ issued, and the statement of a witness that the company "was largely damaged by being enjoined from the use of said right of way," it is error to charge the jury that they may assess damages for delay. *Cooper v. Humes*, (Ala.) 9 So. 841.

³ *Lambert v. Haskell*, (Cal.) 22 P. 327; 80 Cal. 611. See also *Galveston City R. Co. v. Miller*, (Tex. Civ. App.) 38 S. W. 1182; *Belmont Mining & Milling Co. v. Costigan*, 21 Colo. 465. Defendant, having a contract to supply a certain number of cords of wood a week at a certain price, was enjoined from cutting timber on the land. The injunction being dissolved, — *held*, that his damages were measured by the net profits on the wood he could have delivered while the order stood, but did not include profits he could have made afterwards had not his men strayed off pending the injunction, and he been unable, when it was dissolved, to hire enough men to fill his contract. *Moorer v. Andrews*, 17 S. E. 948; 39 S. C. 427.

⁴ *Manufacturers' & Traders' Bank v. C. W. F. Dare Co.*, (Sup.) 16 N. Y. S. 67.

damages for loss of profits of a prospective increase of business by the extension were too remote.¹

§ 947. **Loss of Time and Wages.** — In an action on an injunction bond the plaintiffs are entitled to recover for the loss of time occasioned by the injunction at the usual rate of wages, provided they used diligence to secure other employment during such period. In the absence of all evidence that the plaintiffs used such diligence, a judgment in their favor is erroneous.² And in considering the actual loss and expense occasioned by a writ of injunction, where the plaintiff has been restrained from cutting and drawing wood, and he claimed, as matters of damage, the loss occasioned by reason of his cattle and wagon being thrown out of employment, for the expense of making a road which had become useless, and for injury to his credit, it was held that none of these matters could be taken into consideration.³

§ 948. **Measure of Damages.** — The general principles for measuring damages usually apply in actions for wrongfully suing out injunctions; but courts of equity sometimes modify ordinary rules if the justice of a particular case requires this to be done.⁴

¹ *Chicago City Ry. Co. v. Howison*, 86 Ill. 215. See also *Manufacturers' & Traders' Bank v. Folk*, 83 N. E. 1084; 138 N. Y. 635. Where a defendant, who was the manufacturer, had a lot of beds on hand when suit was instituted, and had prepared to manufacture them on an extensive scale, it was held that he should be allowed as damages the difference between the present value and cost of making them and the damage sustained from stoppage of business; but not the profits he might have made if he had sold the beds, nor for storage, nor for interest on loss in value on the cost. *Tobey Furniture Co. v. Colby*, 35 F. 592. *Mining development.* — Where an injunction was granted to restrain parties from mining on a certain lot, and some time after its dissolution a new discovery was made and a large quantity of mineral was raised from it. In assessing damages on the injunction bond, — *held*, that proof that the use of the money for which the mineral might have been sold was worth more than the legal rate of interest to the parties, by way of enhancing the damages, should be rejected as ideal and speculative, and so, too, as to the proof of the subsequent discovery, — as tending to show what the parties might have realized had they continued mining, the injunction not having been granted. *Gear v. Shaw*, 1 Pinn. (Wis. T.) 608.

² *Muller v. Fern*, 35 Iowa, 420.

³ *Brown v. Jones*, 5 Nev. 374. Loss of profits on property in hands of receiver, see *Lehman v. McQuonn*, 81 F. 138.

⁴ See *Peruvian Guano Co. v. Dreyfus*, (1892) App. Cas. 166. Where the time for which defendant covenanted against the erection of a building expires before the determination of a suit to enjoin such erection, a decree should be rendered merely for damages for the violation of the restriction while it continued in force. *Langmaid v. Reed*, (Mass.) 34 N. E. 593; *Neal v. Taylor*, 20 S. W. 352; 56 Ark. 521. In assessing damages caused by an injunction,

And when it appears that an injunction has not been wantonly issued, but that plaintiff has resorted to it under a mistaken but honest belief that he was entitled to do so, only such damages will be allowed on its dissolution as cover the court costs and counsel fees of defendant.¹

§ 949. **Same — Use of Property.** — A party deprived by the injunction of exercising acts of ownership is entitled to such damages as are the necessary and proximate result thereof.² Thus,

under Comp. Laws, § 4988, contemplating a summary proceeding for such assessment, without trial by a jury, and without formal pleadings required in ordinary actions, no damages must be included that do not necessarily result from the granting of the injunction order. *Edmison v. Sioux Falls Water Co.*, (S. D.) 78 N. W. 910. The measure of damages recoverable by an execution creditor where the sale of the goods levied on has been temporarily enjoined is the amount of debt and interest lost by reason of the wrongful issuance of the injunction. *Winslow v. Mulchey*, (Tenn. Ch. App.) 35 S. W. 762. The damages to be awarded by the judge on the dissolution of an injunction restraining the collection of a judgment being limited to ten per cent on the amount enjoined, the amount within that limit is discretionary with the judge. *Combs v. Bentley*, (Ky.) 41 S. W. 8.

¹ *Hefner v. Hesse*, 29 La. An. 149. The rule of damages in the final decree, — stated, where, under a modification of the injunction, the machinery of a corporation was allowed to be removed from the state. *Multon v. Richardson*, 49 N. H. 75. The amount of damages caused by an injunction is a question of fact to be ascertained at the trial term. *Jackman v. Eastman*, 62 N. H. 273. Where an advertised sale of land under a trust deed is temporarily enjoined, and, on subsequent sale, fails to bring sufficient to pay the secured debt, in an action on the injunction bond, interest on the amount of the debt during the time the sale was delayed is not an element of damage, in the absence of evidence that the property would probably have been sold at the time first fixed for the sale for a sum equal to or greater than that for which it was finally sold. *Belmont Mining & Milling Co. v. Costigan*, (Colo. Sup.) 42 P. 650.

² *Alexander v. Colcord*, 85 Ill. 323. When there is no evidence of malice in suing out an injunction, the damages therefor should be measured by simple compensation for loss sustained. *Brown v. Tayler*, 34 Tex. 198. The government price of land is no criterion by which to ascertain the damages, in a proceeding to assess damages by reason of an injunction granted to restrain the cutting of timber on such land. *Jordan v. Updegraff, McCahon*, (Kan.) 103. *Railroad in highway — Past injuries.* — In an action, the judgment in which awarded an injunction against the maintenance of defendant's railroad in the highway in front of plaintiff's property, with a condition that it should be inoperative on payment of a certain sum, and also awarded damages for past injury to the property, the admission of proof of an offer for the property, as evidence of the value of the fee, is not ground for reversal, as affecting the recovery of damages, that being merely incidental to the right to relief by injunction, or as affecting the amount to be paid to arrest the injunction, that condition not being open to attack by defendant. *Lawrence v. Metropolitan El. Ry. Co.*, 12 N. Y. S. 546. *Removal of mill property.* —

where the removal of a mill is delayed by injunction, the true rule of damages is the rental value of a mill of the same capacity for the same time, to which may be properly added the payment of a watchman and of the manager of the mill, under a subsisting contract, during the time the mill is idle.¹ But the only liability on a bond given in a suit to enjoin the sale of land under a decree is for such damages as were caused by the delay in the execution of the decree.²

§ 950. **Same — Dividends — Sale of Exemption.** — Where a corporation has been restrained by injunction from collecting the dividends due to its stockholders, and the injunction is afterwards dissolved, the stockholders may recover simple interest thereon from the time the dividends were declared, pending the injunction, up to the period of the dissolution thereof.³ And

Plaintiff, alleging title to a mill, obtained an injunction to restrain defendant from removing certain machinery therefrom. Defendant denied plaintiff's title, and alleged that he had conveyed the mill in question to his granddaughter, reserving the right to carry away the machinery. Plaintiff insisted that the machinery, being fixtures, was real estate, and passed in the conveyance to the granddaughter, and that defendant had no right to remove the same. *Held*, whether or not the fixtures were real estate, the granddaughter not choosing to assert title thereto, that defendant's title was good as against plaintiff, and that defendant, on dissolution of the injunction, was entitled to damages sustained by reason of the injunction, the measure of which would be the value of the granddaughter's consent to the removal. *Church v. Barkman*, (Sup.) 16 N. Y. S. 624.

¹ *Wood v. State*, 66 Md. 61; 5 A. 476. Where, on dissolving an injunction, the chancellor limits the damages defendant is entitled to recover on the injunction bond, there was nothing in the decree injurious to defendant, as the question of the measure of damages was without the chancellor's jurisdiction. *Bogacki v. Welch*, (Ala.) 10 So. 330. But it is error, in dissolving an injunction restraining a mortgagee from executing a power of sale, to enter judgment *in personam* against plaintiff and his surety on the injunction bond for the value of the property mortgaged which the mortgagee had been prevented from seizing. *Lawson v. Barton*, (Ark.) 7 S. W. 387.

² *Staples v. Handley*, 88 Tenn. 30; 12 S. W. 339.

³ *Heck v. Bulkley*, (Tenn.) 1 S. W. 612. *Delay of payment on contract, etc.* — In an assessment of damages upon the dissolution of a temporary injunction restraining defendants from completing a work undertaken by contract, there is no error in an instruction that defendants are entitled to six per cent upon the money detained from them under their contract, during the pendency of the injunction, from the date on which they would have completed the contract until date of dissolution, to reasonable counsel fees and expenses, and compensation for loss of time in defending against the injunction, and reasonable costs for putting the work into the same condition it was in when the injunction was served, provided the construction was proper in the first instance, and the deterioration not due to faulty construction. *St. Louis, I. M. & S. Ry. Co. v. Schneider*, 30 Mo. App. 620.

damages for wrongfully enjoining a levy on property, part of which is exempt, are measured by the value of the residue.¹

§ 951. **Where Judgment enjoined.** — Under statutes of several states, where an injunction has been obtained against the enforcement of a judgment, and the evidence given on the trial of rule to dissolve it shows clearly that the plaintiff had no grounds for injunction, damages should be given against the plaintiff in injunction, according to the amount of the judgment enjoined.² But upon the dissolution of an injunction, judgment cannot be rendered on the judgment bond for the principal debt enjoined, unless the statute authorizes it, or special reason is shown.³ In other cases the remedy is by action on the bond.⁴ When, on the dissolution of an injunction restraining execution of a judgment at law, it appears that the judgment and the interest accrued thereon exceed in amount the penalty of the injunction bond, a court of equity will provide a remedy, and allow interest on the penalty of such bond, to an amount not

¹ *Coates v. Caldwell*, 71 Tex. 19; 8 S. W. 922.

² *Stewart v. Robinson*, 24 La. An. 182; *Green v. Reagan*, 32 La. An. 974; *Verges v. Gonzales*, 33 La. An. 410; *Elder v. New Orleans*, 31 La. An. 500. *Notice.* — Where execution for a judgment for a sum of money has been enjoined, the surety in the injunction bond, being *ipso facto* co-plaintiff, is not entitled to notice of the dissolution before issuance of the execution. *Freedman v. Adler*, 36 La. An. 384. An injunction preventing the sale on execution of particular property does not prevent the execution of the judgment, within the meaning of *Mansf. Dig.* § 8763, which authorizes an assessment of damages on dissolution of an injunction where the proceedings upon a judgment have been stayed. *Stanley v. Bonham*, 52 Ark. 354; 12 S. W. 706. See *Wingfield v. McLure*, 48 Ark. 510; 3 S. W. 489.

³ *Texas & New Orleans R. R. Co. v. White*, 57 Tex. 129; *Stirlen v. Neustadt*, 50 Ill. App. 378. On the dissolution of an injunction in restraint of a judgment, the judgment creditor is not entitled to a judgment on the injunction bond for the amount of the enjoined judgment. *Fernandez v. Casey*, 77 Tex. 452; 14 S. W. 149. Compare *Gault v. Goldthwait*, 34 Tex. 104. *Refunding bond.* — When the collection of a judgment was restrained by injunction, which was afterwards dissolved, and a judgment rendered against the sureties in the injunction bond, — *held*, that it was error so to do without first requiring the plaintiff in the original judgment to execute a refunding bond as required by the statute of Texas (*Pasch. Dig. art. 3937*). 1871, *Foster v. Shephard*, 33 Tex. 687.

⁴ *Alexander v. Gish*, 88 Ky. 13; 9 S. W. 801. *Set-off.* — Where a bill is filed to obtain an injunction against judgments obtained on several notes, on the ground that the complainant has a set-off against the notes, and it appears that the set-off does not apply to one of the notes, — *held*, that the holder of the judgment on that note was entitled to costs. *Anderson v. Mason*, 6 Dana, (Ky.) 217.

exceeding the principal and interest of the judgment.¹ But the sureties on an injunction bond cannot be held liable for the amount of the judgment enjoined, unless it be proved that the judgment was lost in consequence of the injunction.² Nor in case of an injunction granted to restrain the sale of land levied on, in order that the plaintiff may have the benefit of its value if found entitled to it, are the obligors in the injunction bond liable beyond the costs and damages occasioned by enjoining the sale.³

§ 952. **Costs and Expenses of Litigation.** — Costs and counsel fees, or other general expenses of defending an action in which the preliminary injunction has been granted, are not damages sustained by reason of the injunction, unless the injunction rendered the trial of the action more difficult and expensive than it would otherwise have been.⁴ But when the complainant had

¹ *Marshall v. Minter*, 43 Miss. 666.

² *Hefner v. Hesse*, 29 La. An. 149. A bill filled by the grantee of a judgment creditor, praying that the judgment might be declared to be no lien on the premises conveyed to complainant, is not a suit to enjoin a judgment, within the meaning of Rev. St. Ill. c. 69, §§ 7, 8, 12, regulating the bond and the measure of damages, in suits to enjoin judgments. *Moriarty v. Galt*, 23 Ill. App. 213; affirmed, 125 Ill. 417; 17 N. E. 714. Upon dissolution of an injunction restraining the prosecution of an action at law, the amount sued for in such action cannot be assessed as damages, though the defendant in that action has become insolvent pending the injunction, since the rights of the parties should be determined in the law court. *Walker v. Pritchard*, (Ill.) 25 N. E. 573.

³ *Hubbard v. Farvell*, 12 Lea, (Tenn.) 304. *Deposit for costs.* — After the dissolution of an injunction in restraint of a suit at law, the plaintiff in the suit at law obtained a verdict, and thereupon moved for payment of his costs in said suit, which were occasioned by the injunction, out of the deposit made by the plaintiff on obtaining the injunction. *Held*, that the right to the deposit must abide the event of the cause. *Leggett v. Dubois*, 1 Paige, (N. Y.) 574.

⁴ *Allen v. Brown*, 5 Lans. (N. Y.) 511; *Lyon v. Hersey*, 32 Hun (N. Y.), 253; *Galveston, H. & S. A. Ry. Co. v. Wave*, 74 Tex. 47; 11 S. W. 918; *Tamarou v. Southern Illinois, etc. University*, 54 Ill. 334. See also *Sweet v. Mowry*, (Sup.) 25 N. Y. S. 32; 71 Hun, 381; *Gooch v. Furman*, 62 Ill. App. 340; *Fenton Metallic Manuf'g Co. v. Chase*, (C. C.) 73 F. 831; *Jackson v. Millspaugh*, (Ala.) 14 So. 44, *Alliance Trust Co. v. Stewart*, (Mo. Sup.) 21 S. W. 793. "Lost time at court and procuring witnesses" are not proper elements of damages to be allowed upon the dissolution of an injunction. *Densch v. Scott*, 58 Ill. App. 33. In an action on an injunction bond there can be no recovery of expenses of an unsuccessful attempt to dissolve the injunction. *Pollock v. Whipple*, (Neb.) 77 N. W. 355. Where an injunction is perpetuated for more than is credited on the execution, costs should not be decreed to the complainants. *White v. Guthrie*, 1 J. J. Marsh. (Ky.) 503. See *Golden v. Maupin*, 2 J. J. Marsh. (Ky.) 236. Where an injunction, a mere conservatory process not necessarily

due notice of a motion to dissolve an injunction and he neglected to appear and oppose the motion, the defendant was permitted to take his order dissolving the injunction, with costs.¹ So if, during the pendency of a bill for an injunction against a judgment for purchase money, and for the rescission of a contract for the purchase of land on the ground of an incumbrance and a defect of title, the vendor removes the incumbrance and procures the title, the injunction will be dissolved, with costs to the plaintiff, but without damages; yet if the plaintiff had another case pending involving the same questions, where he could have had the relief asked by a proceeding in that case, he will not be allowed his costs.²

§ 953. **Counsel Fees — General Rule.** — The general rule with respect to the allowance of fees of attorneys and counsel as damages is that they are allowable upon judgment, whether interlocutory or final, that complainant was not entitled to the injunction in the first place; but this rule has been reversed by statute in a few states, modified in many, and given statutory expression in others.³ But quite generally it is held that the

connected with the main action, is dissolved because issued by an incompetent officer, the costs must be borne by plaintiff. *Sale v. Van Bibber*, 11 La. An. 628. If an injunction, which was well taken when applied for, is, from subsequent circumstances, dissolved, plaintiff will be exonerated from costs caused by his adversary's fault. *Temple v. Marshall*, 11 La. An. 631. Where the plaintiff partially succeeds in an injunction suit, he is entitled to recover the costs of suit. *Manning v. Ayraud*, 15 La. An. 126.

¹ *Kellogg v. Barnes*, Harr. (Mich.) 258.

² *Young v. McClung*, 9 Grat. (Va.) 336.

³ In Texas, attorney's fees incurred in procuring the dissolution of an injunction are not regarded as elements of damage. *Galveston, H. & S. A. Ry. Co. v. Wave*, 74 Tex. 47; 11 S. W. 918; *Jones v. Rosedale St. Ry. Co.*, 75 Tex. 382; 12 S. W. 998; *Davis v. Same*, 75 Tex. 381; 12 S. W. 999. Same rule in Pennsylvania. *Sensenig v. Parry*, 113 Pa. St. 115; 5 A. 11. Attorney's fees are allowed as damages when an injunction is dissolved, but not when it is sustained, particularly in the absence of malice. *Townsend v. Fontenot*, 42 La. An. 890; 8 So. 616. Under the Missouri statute providing that an injunction bond must be in a sum sufficient "to secure the amount or other matter to be enjoined, and all damages that may be occasioned by such injunction," a party who has been enjoined from proceeding in a partition suit, to whom the rents have been awarded on dissolution of the injunction, may recover under the injunction bond the amount of such rents lost and attorney's fees occasioned by reason of the injunction; but a party as to whom no restraining order has been granted, and who is interested in the subject-matter of the suit as a prior lienor, will not be awarded attorney's fees. *Holloway v. Holloway*, 103 Mo. 274; 15 S. W. 536. Where the supreme court of appeals reverses a

fees which the defendant who has been enjoined may recover are only such as were necessary in procuring a dissolution of the injunction, and not those paid in general defence of the action where other relief than an injunction is sought.¹ And it is held in Kentucky that where the injunction is the only relief sought, no recovery for counsel fees can be had, and that the only damages recoverable are such as result from the operation of the injunction itself.² A clear case for the allowance of counsel fees is presented where an injunction has been obtained against a defendant, and a trial is necessary, not merely to dispose of the issues raised in the suit, but to get rid of the injunction.³

decree making an injunction perpetual, and dismisses the bill in a suit in which an injunction is the only relief asked, a reasonable amount paid counsel for procuring the dissolution of the injunction may be recovered in addition to the taxable attorney's fee, in a suit on a bond conditioned for the payment of all costs and of all damages sustained in case the injunction should be dissolved. *State v. Medford*, 34 W. Va. 633; 12 S. E. 864.

¹ *Porter v. Hopkins*, 63 Cal. 53; *Lamb v. Shaw*, (Minn.) 45 N. W. 1134; 43 Minn. 507; *Shores v. Shores*, 34 Mo. App. 208; *Lichtenstadt v. Fleisher*, 24 Ill. App. 92; *Bustemente v. Stewart*, 55 Cal. 115; *Holmes v. Weaver*, 52 Ala. 516; *Colby v. Meservey*, (Iowa) 52 N. W. 499; *Bolling v. Tate*, 65 Ala. 417; s. c. 39 Am. Rep. 5; *Thurston v. Haskell*, 81 Me. 303; 17 A. 73; *Baggett v. Beard*, 43 Miss. 120; *Cook v. Chapman*, 41 N. J. Eq. 152; 2 A. 286; *Thomas v. McDanald*, 77 Iowa, 126, 299; 42 N. W. 301; *Lansley v. Nietert*, 78 Ia. 758; 42 N. W. 635; *Raupman v. Evansville*, 44 Ind. 392; *Walsh v. Lackland*, 8 Mo. App. 122; *Solomon v. Chelsey*, 59 N. H. 24; *Oliphint v. Mansfield*, 36 Ark. 191; *Darst v. Gale*, 88 Ill. 136; *Randall v. Carpenter*, 88 N. Y. 293; *Nimocks v. Welles*, 42 Kan. 39; 21 P. 787; *Doyle v. Brown*, 30 Ill. App. 88. A decree assessing damages to cover solicitor's fees, upon the dissolution of an injunction, is erroneous where there is no evidence of the value of the services having distinct reference to the dissolution of the injunction. *Zibell v. Barrett*, 30 Ill. App. 112. The question whether counsel fees shall be allowed upon a decree granting an injunction in a suit brought by stockholders in a railroad against the railroad company as trustee is for the trial term. *Burke v. Concord Railroad*, 62 N. H. 581.

² *New National Turnpike Co. v. Dulaney*, 86 Ky. 516; 6 S. W. 590.

³ *Newton v. Russell*, 24 Hun (N. Y.), 40. Where counsel fees and expenses are incurred in defeating the action, the dissolution of the injunction being merely incidental, such fees and expenses cannot be allowed as damages. *Field v. Medenwald*, 26 Ill. App. 642. Sureties on a temporary order for an injunction which is allowed to expire cannot be held for attorney's fees incurred upon resisting an application for another order. *Kittle v. De Lamater*, 7 Neb. 70. Where the controversy is whether a judgment is a lien on certain premises, and an injunction staying execution is issued, contingent upon the decision of this question, the judgment creditor is not entitled, upon a final decision sustaining the lien of his judgment, to attorney's fees paid in defending the suit upon its merits as an element of damage occasioned by the injunction. *Moriarty v. Galt*, 23 Ill. App. 213; affirmed, 125 Ill. 417; 17 N. E. 714.

Where not fixed by statute the allowance of counsel fees as damages is so far discretionary with the court as to render any further discussion of the subject without profit.

§ 954. **Counsel Fees in Federal Courts.** — While counsel fees, are not recoverable on injunction bonds in the federal courts¹ yet that fact does not preclude recovery of such damages in an action in a state court on an injunction bond given in a United States court.² And in an action upon an injunction bond for damages for the wrongful suing out of the writ, the plaintiff may recover for the services of counsel in the preparation of a motion to dissolve, and affidavits to sustain it, if made in good faith, notwithstanding the motion was not in fact passed upon by the court, but the injunction was only dissolved upon final hearing.³

§ 955. **Same — Unpaid Fees — Value — County Liable.** — Where the condition of an injunction bond is to pay defendant all damages he may sustain by the issuing of the injunction, in case it be dissolved, defendant may recover his reasonable counsel fees, though he may not have actually paid the fees, provided he has become liable for them.⁴ But when an action is brought on an injunction bond for the recovery of attorney's fees, evidence of services upon an appeal, after the injunction was dissolved, is not admissible, as such expenses are not an element of damage.⁵ And it is error to make an allowance for a solicitor's fees on the dissolution of an injunction, except upon evidence showing that services of the solicitor were actually rendered, and that they were in value equal to the amount ordered to be paid.⁶

¹ *Oelrichs v. Spain*, 15 Wall. 211.

² *Mitchell v. Hawley*, 79 Cal. 301; 21 P. 833. See also *Hannibal, etc. R. R. Co. v. Shepley*, 1 Mo. App. 254; *Nimocks v. Welles*, 21 P. 787; 42 Kan. 39; *Aiken v. Leathers*, 40 La. An. 23; 3 So. 357.

³ *Wallace v. York*, 45 Iowa, 81. On the dissolution of an injunction prayed as auxiliary to the relief of specific performance of a contract to convey land, counsel fees may be allowed in Missouri to defendants, though they made no motion to dissolve the injunction, but defended on the merits against the specific performance. *Brownlee v. Fenwick*, 103 Mo. 420; 15 S. W. 611.

⁴ *Wittich v. O'Neal*, 22 Fla. 592; *Meaux v. Pittman*, 35 La. An. 360; *Holthus v. Hart*, 9 Mo. App. 1; *Underhill v. Spencer*, 25 Kan. 71.

⁵ *Ellwood Manuf. Co. v. Rankin*, 70 Iowa, 403; 30 N. W. 677. No increase of damages for attorney's fees will be allowed on the dissolution of an injunction, for services rendered in the appellate court, where it appears from the record that the petition in the original suit was amended by consent of both parties to give that court jurisdiction. *Lemeunier v. McClearley*, 41 La. An. 411; 6 So. 338.

⁶ *Delahanty v. Warner*, 75 Ill. 185. An allowance for solicitor's fees in a

Under a statute giving counties all remedies to which individuals are entitled, a county must pay the attorney's fees of fence commissioners on dissolution of an injunction wrongfully sued out by the county against the commissioners.¹

§ 956. **Not recoverable unless Injunction improperly granted.** — If an injunction is properly granted, no damages can be recovered by the party enjoined, although the suit was afterwards discontinued by the plaintiff, or although the court of appeals decided the suit against the plaintiff.² And the sureties were held not liable on an undertaking to pay such damages as the complainant might sustain, "if the court should finally decide that he was not entitled" to the injunction, although the case was settled upon a stipulation by the terms of which judgment was entered for a specified sum of money and dissolving the injunction.³ On the other hand, where an injunction is allowed on condition that the petitioner therefor give defendants a bond to indemnify them for any damage which the injunction may cause them, the bond remains valid, and will sustain a recovery, even though the injunction bill is dismissed for want of jurisdiction.⁴

judgment for damages on the dissolution of an injunction will not be set aside because it is less than the lowest amount fixed by the witnesses as to the value of the services rendered. *Lichtenstadt v. Fleisher*, 24 Ill. App. 92. On the dissolution of an injunction, the opinion of an attorney as to the reasonable value of his services is an insufficient basis for an allowance for solicitor's fees. *Rosenthal v. Boas*, 27 Ill. App. 430. On leave granted to withdraw the complaint, and judgment for the defendant, the attorney's fees may be included in the damages upon the complainant's injunction bond. *Beeson v. Beeson*, 59 Ind. 97.

¹ *Freeman v. Supervisors*, 66 Miss. 1; 5 So. 516. *Ex officio services.* — In an action to restrain collection of certain taxes against a railway corporation, on dissolution of the injunction, — *held*, that no damages could be allowed for services of the attorney-general and county attorneys of the several counties, the same being rendered *ex officio*. *Wilson v. Weber*, 3 Ill. App. 125.

² *New York, West Shore, etc. Ry. Co. v. Omerod*, 29 Hun (N. Y.), 274; *Hall v. Sexton*, 19 N. Y. St. Rep. 677; 3 N. Y. S. 549. See also *Apollinaris Co. v. Venable*, 32 N. E. 555; 136 N. Y. 46; *Mainard v. Webb*, 48 Ill. App. 182; *Brown v. Baldwin*, (Mo. Sup.) 25 S. W. 863.

³ *Prefontaine v. Richards*, 47 Hun, 418.

⁴ *Kimm v. Steketee*, 44 Mich. 527. See *Goodrich v. Foster*, 131 Mass. 217. Upon the filing of an injunction bill a bond was given conditioned to abide by and perform the judgment of the court. *Held*, that as there was no order of court prescribing the conditions of the bond, and as there is no statutory provision for such a condition as was here asserted, the sureties upon the bond incurred no liability. *Baxter v. Washburn*, 8 Lea (Tenn.), 1.

§ 957. **Stage of Proceedings at which Damages recoverable — General Rule.** — As a general and practicably universal rule, an action cannot be maintained on an injunction bond until after the final termination of the suit in which the bond was given.¹ But formal dismissal of the bill is not necessary in order to subject the obligors in an injunction bond to payment of damages and costs; that the court has refused to grant the relief prayed is enough.² Where a plaintiff who has obtained a preliminary injunction, after it has been served, enters an order vacating it, and subsequently, without the consent of defendant, obtains an *ex parte* order discontinuing the action, these orders are equivalent to a determination that plaintiff was not entitled to the injunction, and defendant is entitled to an order of reference to ascertain his damages by reason thereof.³ But the dismissal

¹ Gray v. Veirs, 23 Md. 159; Adams v. Ball, (Miss.) 5 So. 109; Kelley v. McMahon, 32 Hun (N. Y.), 347; Nolan v. Johns, 27 Mo. App. 502; Clark v. Clayton, 61 Cal. 634; Brown v. Galena Mining & Smelting Co., 32 Kan. 528; Dougherty v. Dore, 63 Cal. 170; May v. Walter, 85 Ala. 438; 6 So. 610; Goodbar v. Dunn, 61 Miss. 624; Krug v. Bishop, 44 Ohio St. 221; 6 N. E. 252; Vanderbilt v. Schreyer, 28 Hun (N. Y.), 61; Thompson v. McNair, 64 N. C. 448; De Berard v. Prial, 54 N. Y. S. 534; 34 App. Div. 502; Columbus, H. V. & T. Ry. Co. v. Burke, (Ohio Sup.) 43 N. E. 282; New York City Suburban Water Co. v. Bissell, 28 N. Y. S. 938; 78 Hun, 176; Browne v. Edwards & McCulloch Lumber Co., (Neb.) 62 N. W. 1070; Asevado v. Orr, 34 P. 777; 100 Cal. 293; Kilpatrick v. Haley, 41 P. 508; 6 Colo. App. 407; Crawford v. Pearson, (N. C.) 21 S. E. 561; American Bonding & Trust Co. of Baltimore City v. Logansport & W. V. Gas Co., 95 F. 49; Guptil v. City of Red Wing, (Minn.) 78 N. W. 970; Reddick v. Webb, (Okl.) 50 P. 363; Loekner v. Hill, 19 Mo. App. 141, holding that a motion to assess damages on an injunction bond may be made after the injunction has been dissolved and the bill dismissed, if made before the term has elapsed. It is not sufficient that the impropriety of granting the injunction appears by the facts developed on the trial. Benedict v. Benedict, 76 N. Y. 600. In a suit on the bond, the ground of the injunction cannot be inquired into. Bemis v. Gannett, 8 Neb. 236. And the fact of the fairness of the complainant in making the application for such restraining order does not affect the question. (Runyon, Chancellor, and Reed, J., dissenting.) New York, etc. R. R. Co. v. Dennis, 40 N. J. L. 340. Plaintiff sued to enjoin defendant from executing a warrant for the removal of plaintiff from certain premises, and obtained a preliminary injunction, which was subsequently vacated, plaintiff consenting thereto. A motion for leave to discontinue the action was opposed by defendant, but granted on payment by plaintiff of the taxed costs of the suit. Held, that there had been a determination that plaintiff was not entitled to the injunction, and that defendant was entitled to an order of reference to ascertain his damages. Amberg v. Krauer, 56 Hun, 640; 8 N. Y. S. 821.

² Coltart v. Ham, 2 Tenn. Ch. 356.

³ Pacific Mail Steamship Co. v. Toeo, 85 N. Y. 646; s. c. 9 Daly (N. Y.),

of the action without prejudice, and the dissolution of the injunction thereon, do not constitute a breach of the condition of the undertaking.¹ Nor is such final decision to be presumed from the omission of a referee in ordering a sale, to make any direction as to the preliminary injunction.² Where, however, after a hearing, the bill, on its merits, is dismissed, and the dismissal entered on the docket, an action may be maintained on the bond given to procure the preliminary injunction, without a formal decree being signed and filed.³ Suit cannot be brought on an injunction bond until a final hearing, although the temporary injunction has been dissolved upon *ad interim* motion because improperly granted and the writ wrongfully issued.⁴ On the other hand, on dismissal of the petition on which an injunction was granted, a cause of action at once arises against the obligors in the bond.⁵

301; *Pac. Mail S. S. Co. v. Leuling*, 7 Abb. (N. Y.) Pr. n. s. 37; *Brown v. Galena Mining & Smelting Co.*, 32 Kan. 528.

¹ *Krug v. Bishop*, 44 Ohio, 221; 6 N. E. 252. Compare *Mitchell v. Sullivan*, 30 Kan. 231. When a suit for an injunction has been fully tried, submitted, and virtually determined in favor of the defendant, a motion to withdraw without prejudice should be refused. *Chicago, I. & D. Ry. Co. v. Estes*, 71 Iowa, 703; 33 N. W. 124. See *Kiser v. Lovett*, 106 Ind. 325; 6 N. E. 816.

² *Benedict v. Benedict*, 15 Hun (N. Y.), 305.

³ *Thurston v. Haskell*, 81 Me. 303; 17 A. 73. A dismissal of a suit in vacation, by order of plaintiff to the clerk, has no effect as a judgment until entered of record by the court at a succeeding term; and such a dismissal of a suit in which an injunction has been granted does not prevent the assessment of damages on the injunction bond on motion. *Campbell v. Carroll*, 35 Mo. App. 640.

⁴ *Monroe Bank v. Gifford*, 65 Iowa, 648. On the dissolution of a temporary injunction, an assessment of damages in defendant's favor is premature if complainant's right to a permanent injunction remains undisposed of. *Woerishoffer v. Lake Erie & W. Ry. Co.*, 25 Ill. App. 84. After an injunction *pendente lite* has been dissolved at the final hearing, a motion for an assessment of damages caused by the injunction, made at a subsequent term, without notice to the adverse party, should be denied. *Hoffelmann v. Franke*, 96 Mo. 533; 10 S. W. 45.

⁵ *Rice v. Cook*, (Cal.) 28 P. 219; *Pugh v. White*, 78 Ky. 210; *Tobey Furniture Co. v. Colby*, 35 F. 592; *Alexander v. Gish*, 88 Ky. 18; 9 S. W. 801. Only when an injunction enjoining a judgment is dissolved does the Ky. Code, § 295, empower the chancellor immediately to render the judgment for the damages; in all other cases the remedy is on the injunction bond. *Logsdon v. Willis*, 14 Bush (Ky.), 183. The circuit court in chancery has not jurisdiction, upon the dissolution of an injunction, to render judgment for damages against the sureties in the injunction bond. *Clayton v. Martin*, 31 Ark. 217. Under Rev. St. Ill. c. 69, § 12, which provides that on dissolution of an injunction the

§ 958. **Same — Amendment — Appeal — Collateral Undertaking.** — Where a motion to dissolve an injunction is granted upon full proof, this is a final determination that the injunction should not have been issued, and a suit on the injunction bond is maintainable, though plaintiff might have amended his complaint, but did not, and no judgment was entered in the suit upon plaintiff's failure to amend.¹ But the right to enforce an injunction bond is suspended during appeal, and as the right to enforce it depends upon the final determination of the suit in which it was given, it is immaterial whether *supersedeas* was obtained or not.² And in a suit brought in a court of the United States upon an undertaking given in an action in a state court, conditioned to pay the judgment, if a motion for a new trial is denied, if it appears that the undertaking was merely an additional security for the payment of the judgment, and that the defendant has appealed from the order denying a new trial, and that the state court has upon motion stayed proceedings upon the judgment pending the appeal, the defendants can by an auxiliary suit in equity obtain a stay of all proceedings upon any judgment that the plaintiff may recover in a suit on the undertaking pending the appeal in the state court.³

§ 959. **Reference to compute Damages.** — By statute in several of the states, after dissolution of an injunction, the damages recoverable on a bond may be ascertained by a referee, and the assessment enforced by order of the court, the sureties being made parties to the proceeding.⁴ And in New York it is held

court of chancery shall assess damages, such damages may be assessed on the partial dissolution of an injunction. *Walker v. Pritchard*, (Ill.) 25 N. E. 573.

¹ *Bennett v. Pardini*, 63 Cal. 154.

² *Cohn v. Lehman*, 98 Mo. 574; 6 S. W. 267. The defendant, in a suit on the bond, to show that the injunction had not been decided, offered an order of the supreme court to the court in which the injunction was had, directing that court to fix the amount of a suspensive appeal bond. *Held*, insufficient without proof that the appellant took the necessary steps to and actually did, prosecute his appeal. *Woodbury v. Bowman*, 13 Cal. 634. See *Eldridge v. Wright*, 15 Cal. 88. Where the judgment of the circuit court granting a perpetual injunction is affirmed by the appellate court, but the injunction is afterwards dissolved on writ of error by the supreme court, the circuit court may assess the damages on the dissolution directed by the supreme court. *Garrity v. Chicago & N. W. Ry. Co.*, 22 Ill. App. 404.

³ *Merchants' National Bank v. Leland*, 88 How. (N. Y.) Pr. 31.

⁴ See *Hill v. Thomas*, 19 S. C. 230; *Poillon v. Volkenning*, 18 N. Y. 385;

error, in such case, for the court to deny a motion for a reference without directing any other mode of ascertaining the damages.¹ The proper practice is to give the sureties in an injunction bond notice of the referee's report assessing the damages. The report, when duly confirmed, is, in the absence of fraud, conclusive upon them.² But a reference to assess damages upon injunction should not be granted, after appeal from the judgment is perfected, until final decision upon the appeal.³

§ 960. **Remedy by Separate Action.** — But in the absence of a statute an injunction bond can only be enforced by action, whether executed with or without sureties. The court cannot, upon confirming the referee's report, summarily order the payment of damages, and enforce its order by attachment, and that an attorney of the court executed the bond makes no difference.⁴

Parish v. Reeve, 63 Wis. 315; *Fears v. Riley*, (Mo.) 48 S. W. 828; *Harter v. Westcott*, (City Ct. Brook.) 32 N. Y. S. 111; 11 Misc. Rep. 180; *Grainger v. Smyth*, (Sup.) 28 N. Y. S. 934. Under the law of Illinois, where the defendant fails to claim and have his damages assessed when the injunction is dissolved and the suit dismissed, he has no right to afterwards have damages assessed in a suit on the bond. *Russell v. Rogers*, 56 Ill. 176.

¹ *Jacobs v. Miller*, 18 N. Y. Supreme Ct. 441.

² *Jordan v. Volkenning*, 72 N. Y. 300; *Leslie v. Brown*, 90 F. 171; 32 C. C. A. 556. Compare *Poillon v. Volkenning*, 18 N. Y. Supreme Ct. 385. Where an *ex parte* preliminary injunction is vacated on a contested motion, without stating why it was vacated, and the complaint is dismissed on the trial, the conclusion is warranted that the court finally decided that plaintiff was not entitled to the preliminary injunction, and an order appointing a reference to ascertain the damages on a bond given under Code Civil Proc. N. Y. § 620, providing for damages if the court finds plaintiff was not entitled to the injunction, will not be disturbed. *Jordan v. Donnelly*, 11 N. Y. S. 836. But in Iowa upon the dissolution of an injunction damages consequential in their nature cannot be assessed in a summary manner upon motion. Process must issue, issues be formed, and evidence introduced, as in actions for the recovery of damages. *Taylor v. Brownfield*, 41 Iowa, 264. See also *Tyler Min. Co. v. Last Chance Min. Co.*, 90 F. 15; 32 C. C. A. 498.

³ *Howard v. Park*, 59 How. (N. Y.) Pr. 344; s. c. 21 Hun (N. Y.), 618.

⁴ *Randall v. Carpenter*, 47 N. Y. Superior Ct. 205; *Beopple v. Green*, 38 La. An. 1191; *Sartor v. Strassheim*, 8 Colo. 185; *Barber v. Levy*, 78 Miss. 484; *Columbus, H. V. & T. Ry. Co. v. Burke*, 54 Ohio St. 98; *Steele v. Gordon*, 14 Wash. 521; *State v. Hall*, 40 W. Va. 455; *Montana Mining Co. v. St. Louis Mining & Milling Co.*, (Mont.) 48 P. 305; *Grove v. Bush*, (Iowa) 53 N. W. 88; *Fauber's Adm'r's v. Gentry's Adm'r*, (Va.) 15 S. E. 899; *Smith v. Mutual Loan & Trust Co.*, (Ala.) 14 So. 625; *Patterson v. Rinard*, 81 Ill. App. 80. Except where execution of a judgment is enjoined, sureties on an injunction bond must be proceeded against by a separate action on the bond. *Scott v. Sheriff*, 30 La. An. Part I. 580. Excusable delay in proceeding for damages, see *Allen v. Jones* (C. C.) 79 F. 698.

But it seems that a United States circuit court, on dissolving an injunction issued on a bond conditioned to pay such damages as may be sustained by reason thereof, as a court of equity, may, on general principles, in its discretion, and to put an end to litigation in a matter of which it has jurisdiction, assess the damages on the bond, instead of leaving the defendant to his remedy at law.¹ The ascertainment of damages by the court trying the injunction suit is not a substitute for, but is auxiliary to, the action at law on the bond.² It was once held in New York that it was the proper practice for the court to order a plaintiff in an injunction suit, who has given the required undertaking, to pay all the damages, which, upon dissolution of the injunction, have been assessed at a reference appointed for the purpose, and of which he had notice, and to enforce such payment if necessary, by attachment.³ But this view was shortly afterwards repudiated, and the general rule above stated recognized.⁴ The order in such proceedings should be limited to fixing the amount of damages; and a provision therein requiring the plaintiff to pay the same, is improper. The amount of damages so ascertained is conclusive upon the parties and the sure-

¹ *Russell v. Farley*, 105 U. S. 433, and only in very exceptional cases would a federal court send the matter before a jury. *Coosaw Min. Co. v. Farmers' Min. Co.*, (Cir. Ct.) 51 F. 107. But thus the circuit court, in rendering judgment for the defendant in a suit to enjoin the foreclosure of a mortgage, cannot give judgment on the injunction bond for the mortgage debt, with interest and damages, in accordance with the state practice, conditioned to pay "all such damages" as the obligee "may recover against us," nor in default of such a judgment, or some judgment fixing a recovery, can that court give judgment for the plaintiff in a suit on the bond, as without such a recovery there can be no breach of the condition. *Bein v. Heath*, 12 How. 168. Kentucky Civil Code, 295, provides that, on the dissolution of an injunction to stay proceedings the damages shall be assessed by the court, and that if the delivery of the property has been delayed by the injunction, the value of the rent, use, or hire shall be assessed. *Held*, that the remedy by assessment is exclusive of all other remedies. *Hayden's Adm'rs v. Phillips' Admr.* (Ky.) 11 S. W. 951.

² *White v. Bowman*, 10 Lea (Tenn.), 55. See *Davis v. Hart*, 66 Miss. 642; 6 So. 318. Under Rev. St. 1879, § 2713, providing that, on the dissolution of an injunction, damages shall be assessed and judgment rendered against the "obligors on the bond," the sureties have a right on motion for such assessment and judgment, to be let in to defend, and to require a jury. *Nolan v. Johns*, (Mo. Sup.) 18 S. W. 1107; 27 Mo. App. 502, affirmed.

³ *Patterson v. Bloomer*, 7 Abb. (N. Y.) Pr. n. s. 376; 38 How. Pr. 280.

⁴ *Leavitt v. Dabney*, 2 Sweeny (N. Y.), 613; 9 Abb. Pr. n. s. 373; 40 How. Pr. 277.

ties; but payment can only be enforced by action upon the undertaking.¹ In Arkansas it is held that judgment rendered against the sureties on an injunction bond, upon dissolution of the injunction, is erroneous, yet will not be reversed upon an appeal of the principal alone.² There being no statute in Missouri authorizing the summary assessment of damages against the sureties on an injunction bond, such assessment, on the dissolution of the injunction, is void.³

§ 961. **Compliance with Conditions.** — There can be no recovery without compliance with the express conditions of the bond, or such as are imposed by the court. And upon a decree declaring dissolved an injunction on a sale under a trust deed, but continuing it until a collateral security held by the *cestui* be delivered to complainant, no suit lies on the bond till this condition be complied with.⁴

§ 962. **Extent of Recovery against Surety.** — In a suit on an injunction bond, the assessment by the court on the dissolution, and accrued interest, are the proper subjects of recovery. A surety is concluded by the decree assessing the damages, although he was not a party to the suit, and he cannot go behind the decree to show payment made prior thereto.⁵ But on the dissolution of an injunction on the filing of the required bond, with no order as to payment of damages, only the penalty of the bond can be recovered.⁶ The dissolution of an injunction is *prima facie* evidence that the defendant has sustained damages,

¹ *Lawton v. Green*, 64 N. Y. 326; *Hovey v. Rubber Tip Pencil Co.*, 47 How. (N. Y.) Pr. 289.

² *Daniel v. Daniel*, 39 Ark. 266. Compare *Greer v. Stewart*, 48 Ark. 21; 2 S. W. 251.

³ *Nolan v. Johns*, 27 Mo. App. 502; *Coates v. Elliott*, Id. 510. Compare *Dorriss v. Carter*, 67 Mo. 544.

⁴ *Shackelford v. Smith*, 61 Miss. 5. Where the condition in an injunction bond was that the obligors should pay, or cause to be paid, to the obligee, all such costs and damages as should be awarded against the obligors, in case the injunction should be dissolved, — *held*, that the damages must be assessed by the chancellor after the dissolution of the injunction, and before the bill in chancery was disposed of, to authorize a recovery on the bond in an action at law. *McWilliams v. Morgan*, 70 Ill. 551.

⁵ *McAllister v. Clark*, 86 Ill. 286. See *Riggan v. Crain*, 86 Ky. 249; 5 S. W. 561. An injunction having been dissolved, the sureties on the injunction bond are liable, though the court which dissolved it was a federal court, to which the case had been removed, since they cannot collaterally attack the legality of the removal. *Alexander v. Gish*, 88 Ky. 18; 9 S. W. 801.

⁶ *Glover v. McGaffey*, 56 Vt. 294.

and is conclusive and *res adjudicata* as to the issues raised on the dissolution.¹ But a surety on an injunction bond is discharged by an agreement entered into, without his consent, by the plaintiff and defendant, to have the case tried at chambers and decided after court term.² Where, however, a decree dissolving a decree with damages does not expressly condemn the surety on the injunction, a separate suit may be instituted on the injunction bond by the defendants on the injunction, to recover of the surety the amount of the damages.³ A full discussion of the law and practice on injunction bonds is, of course, beyond the scope of this work.⁴

§ 963. **Same — Pendency of Appeal — Partial Dissolution.** — Where, on dismissal of a suit or injunction, a temporary injunction is continued in force pending an appeal, a bond conditioned that the appellant "shall duly prosecute said appeal, and shall moreover pay all damages, and damages growing out of the continuance of the injunction in case the said decree shall be affirmed," makes the sureties thereon liable, upon the decree being affirmed, for damages caused by the continuance of the injunction, though no such damages are awarded in the decree of affirmance, the appellate court having no jurisdiction on such

¹ *Lemeunier v. McClearley*, 41 La. An. 411; 6 So. 338. The sureties on an undertaking on a preliminary injunction are not liable for losses or counsel fees accruing after the final decree making the injunction perpetual, as a preliminary injunction is merged and ceases to have effect when a decree for perpetual injunction is rendered, and Code Civil Proc. Cal. provides only for an undertaking on the preliminary injunction. *Lambert v. Haskell*, 80 Cal. 611; 22 P. 827. *Release of surety.* — An order, entered by consent, modifying an injunction so as to make it less comprehensive than before, does not release the surety on the injunction bond from liability upon dissolution of the injunction as modified, since the modification does not increase his liability. *Brackebush v. Dorsett*, (Ill.) 27 N. E. 934. In a suit for damages on an injunction bond, given to prevent the sale of land under a deed of trust, the *cestui que trust* is the only person who can execute a sufficient release for the damages. *O'Reilly v. Miller*, 52 Mo. 210.

² *Baker v. Frellsen*, 82 La. An. 822. The dismissal of a bill in equity by agreement of parties, after injunction had issued, is not such a final determination that the injunction was wrongfully issued as fixes the liability of the sureties on the injunction bond. *Large v. Steer*, 121 Pa. St. 30; 15 A. 490.

³ *Howell v. Cronan*, 81 La. An. 247.

⁴ The following are some important cases governing such actions in the respective states: *Mark v. Hyatt*, (N. Y. App.) 31 N. E. 1099; 135 N. Y. 306; *Spencer v. Sherwin*, (Iowa) 53 N. W. 86; *Rhodes v. Auld*, 5 Kan. App. 225; *Supreme Court of Independent Order of Foresters v. Order of Foresters*, 94 Wis. 234.

appeal to award such damages.¹ A surety on an undertaking given on obtaining an injunction against several acts, as to some of which it is afterwards determined that an injunction was improper, is liable for loss sustained in respect to that part of the injunction which was dissolved, although, as to the remaining acts, the injunction was perpetuated.²

§ 964. **Damages for maliciously instituting Injunction Suit.** — Unless an injunction was obtained maliciously and without probable cause, the sole remedy for damages occasioned thereby is by suit on the bond required by statute on the allowance of the injunction.³ Under the maxim, *actus legis nemini facit injuriam*, a plaintiff, to avail himself of his common law remedy for injuries arising from an injunction, must allege an abuse of the process through malice and without probable cause; otherwise, his remedy is on the bond.⁴ The common law remedy is not merged in the statutory.⁵ It is not sufficient to allege merely that it was done "wrongfully and without sufficient cause or reason."⁶ And though it may have been improvidently granted, and for that cause is dissolved before answer, that will not, if the case is fairly presented by the bill and verification, entitle the defendant to look to the bond for damages. But if the application upon which the injunction was granted is disingenuous, *mala fide*, or made without due regard to the rights of the court or of the defendant, the complainant is to be regarded as not having been equitably entitled to the injunction, and is liable for damages upon his bond.⁷

¹ Shreffler v. Nadelhoffer, 183 Ill. 536; 25 N. E. 630.

² Pierson v. Ells, 46 Hun, 336.

³ Hayden v. Keith, 32 Minn. 277; Campbell v. Carroll, 35 Mo. App. 640. Where an injunction is procured by plaintiff's attorney of his own motion, under his general authority as such, without malice, and in the honest belief that injunction is the proper remedy, defendant cannot recover exemplary damages; and it is doubtful if such damages can be recovered even for maliciously suing out an injunction. Galveston, H. & S. A. Ry. Co. v. Wave, 74 Tex. 47; 11 S. W. 918.

⁴ Asevado v. Orr, (Cal.) 34 P. 777; 100 Cal. 293. Compare Crawford v. Pearson, (N. C.) 21 S. E. 561.

⁵ Keber v. Mercantile Bank, 4 Mo. App. 195; Iron Mountain Bank v. Mercantile Bank, Id. 505; Burnett v. Nicholson, 79 N. C. 548. Compare Shackelford County v. Hounsfield, (Tex. Civ. App.) 24 S. W. 358.

⁶ Manlove v. Vick, 55 Miss. 567.

⁷ Smith v. Kuhl, 26 N. J. Eq. 97. But where the complainant, with full knowledge of all the facts, by false representation of them obtains an *ex parte* injunction, he is to be regarded as not equitably entitled thereto, and as being

§ 965. **Defences not allowable.** — In an action on an injunction bond, an answer setting up matter which would have been merely a defence to the action for an injunction is insufficient; as where the complaint alleged that an action to enjoin completion of a contract for a street improvement had been defeated, and the answer averred that such improvement would work damage to the adjoining real estate.¹ Nor in an action on a bond given to obtain a temporary injunction against the sale of property levied on under certain judgments, the purpose of which is to recover attorneys' fees and other expenses in obtaining a dissolution of the injunction, can it be objected that the validity of the judgments is not alleged, however well their invalidity might have been urged in the previous suit for the injunction.² Nor is the fact that complainant proceeded in good faith, and believed that he had reasonable grounds for swearing out a bill of injunction, a defence to defendant's claim for actual resulting damages.³ Nor is it any bar to a suit on an injunction bond that damages were not assessed upon the dissolution of the injunction.⁴ Nor

liable to the defendants in damages recoverable under the bond given under rule 46 of the New Jersey court of chancery. *Green v. Philadelphia, F. & G. Co.*, 26 N. J. L. 443.

¹ *Sipe v. Holliday*, 62 Ind. 4. See also *Davis v. Davis*, 65 Miss. 498; 4 So. 554; *Oelrichs v. Spain*, 15 Wall. 211; *Le Strange v. State*, 58 Md. 26; *Smith v. Atkinson*, (Colo. Sup.) 82 P. 425; *Brackenbush v. Dorsett*, 138 Ill. 167; *Jones v. Ross*, 48 Kan. 474; *Rohwer v. Chadwick*, 7 Utah, 385; *Spears v. Armstrong*, (Tenn. Ch. App.) 42 S. W. 37. The fact that sales were made in violation of an injunction enjoining the operation of a business is no defence to an action on the injunction bond for damages accruing from loss of profits from other sales prevented by the injunction. *Steele v. Gordon*, (Wash.) 45 P. 151. An injunction was dissolved for want of equity in the bill. *Held*, that damages were properly assessed in the absence of evidence that the defendant instigated or desired the institution of the suit, notwithstanding the plaintiff's claim that he was misled in bringing the suit by defendant's statements. *Schuyler County v. Donaldson*, 9 Mo. App. 385. Where the evidence in an action on an injunction bond showed that the injunction was obtained to restrain the enforcement of a judgment against land held in the name of the judgment debtor as "trustee," without designating any beneficiary, and that pending the injunction suit the plaintiff therein, the alleged beneficiary, agreed that such judgment should be a lien upon the property, and soon afterwards the injunction was dissolved, — *held*, that in the absence of proof that the judgment creditor had suffered material damage by the injunction, a judgment for defendant would not be reversed, although the plaintiff might be entitled to nominal damages. *Boardman v. Willard*, 73 Iowa, 20; 34 N. W. 487.

² *Midland Ry. Co. v. Stevenson*, (Ind. App.) 33 N. E. 254; *Id.* 256.

³ *Winslow v. Mulchey*, (Tenn. Ch. App.) 35 S. W. 762.

⁴ *Linington v. Strong*, 8 Ill. App. 384.

does the fact that the court granting an injunction had no jurisdiction, and that the injunction was absolutely void, make the injunction bond void, so as to defeat defendant's right to recover thereon for attorney's fees and other expenses incurred by him in resisting the application for an injunction and procuring its dissolution.¹ So a plea which alleges that one of the principal obligors is dead, that the note whose collection was enjoined had been guaranteed by two persons, and that the plaintiff failed to sue such guarantors, whereby the security of their guaranty was lost, is bad, the facts pleaded therein being immaterial.² And the pendency of an action of ejectment, and for mesne profits in another court, is no bar to an action by the same plaintiff against the same defendant and his sureties on an injunction bond, for having wrongfully enjoined him from maintaining an action for possession of the same premises.³

§ 966. **Same Subject.** — Where an injunction bond, given in a suit to restrain the funding and payment of county bonds, is conditioned to pay damages sustained by those designated as defendants and all holders of the bonds, it is no defence to an action on the bond that plaintiffs were not designated defendants in the injunction suit.⁴ A delay of four years in applying for an assessment of damages against the sureties on an injunction bond will not bar recovery, the claim for damages having been left open for settlement between the sureties and their principal.⁵ Nor can sureties on an injunction bond, on an assessment of damages, include as a payment thereon the amount at which

¹ *Jenkins v. Parkhill*, 25 Ind. 473, distinguished; *Robertson v. Smith*, (Ind. Sup.) 28 N. E. 857.

² *Shreffler v. Nadelhoffer*, 133 Ill. 536; 25 N. E. 630.

³ *Large v. Steer*, 121 Pa. St. 30; 15 A. 490.

⁴ *Alexander v. Gish*, 88 Ky. 18; 9 S. W. 801. On a subsequent appeal in the same case it was held that where a case has been removed from a state to a federal court, which dissolves an injunction granted by the state court, but on appeal the United States supreme court reverses the decision, and remands the case to the state court, the order dissolving the injunction is a nullity, and no action can be maintained on the injunction bond because of such order. s. c. 17 S. W. 287.

⁵ *Holcomb v. Rice*, 119 N. Y. 598; 23 N. E. 1112. An action on an injunction bond, to recover damages allowed on the dissolution of the injunction, is only prescribed by ten years from the date of the bond. The prescription of the judgment which was enjoined cannot affect the judgment in the injunction case wherein the bond was given. *Howell v. Cronan*, 31 La. An. 247.

they bid in the land, against the legal foreclosure of a mortgage on which the injunction was granted.¹

§ 967. **Evidence in Mitigation.** — Courts, in estimating damages caused by injunctions, proceed upon equitable grounds; and losses sustained by delays and laches on the part of the defendant should be borne by him.² While matters pertaining to the merits of the injunction suit may not be pleaded in bar of the action on the bond; yet in such action the obligors may prove the facts that entitle them to the injunction in mitigation of damages, if the injunction has been dissolved before the merits of the case have been adjudicated.³ But it cannot be shown either in bar or in mitigation of damages that an injunction was afterwards obtained in another suit.⁴

§ 968. **Rule where Injunction merely ancillary to other Relief.** — Upon dissolution of an injunction on motion, damages should not be awarded for counsel fees incurred generally in the case, since such services may include matters not connected with the injunction.⁵ Where an injunction which is merely ancillary to the cause of action is dissolved on final hearing, counsel fees incurred in defending are not assessable as damages.⁶ Accordingly, an injunction bond conditioned to "abide the decision" of

¹ *Holcomb v. Rice*, 119 N. Y. 598; 23 N. E. 1112.

² *Edmison v. Sioux Falls Water Co.*, (S. D.) 73 N. W. 910. See also *Eastern Ry. Co. v. Brown*, 99 Ky. 540.

³ *Stewart v. Miller*, 1 Mon. T. 801.

⁴ *Swan v. Timmons*, 81 Ind. 243.

⁵ *Lawrence v. Trainer*, (Ill.) 27 N. E. 197.

⁶ *Walker v. Pritchard*, (Ill.) 25 N. E. 573; *Tabor v. Clark*, 15 Colo. 434; 25 P. 181; *Moriarty v. Galt*, 125 Ill. 417; 17 N. E. 714; *Hovey v. Rubber Tip Co.*, 12 Abb. (N. Y.) Pr. n. s. 360; *Newton v. Russell*, 87 N. Y. 527; *Livingston v. Exum*, 19 S. C. 223; *Parker v. Bond*, 5 Mont. 1; *Leonard v. Capital Ins. Co.*, (Iowa) 70 N. W. 629; *Carroll County v. Iowa R. R. Land Co.*, 53 Iowa, 685. *Costs of collateral actions.* — In an action on an injunction bond for costs alleged to have been incurred in obtaining a dissolution of the injunction, it appeared that plaintiff was proceeding to sell certain lands under a decree of foreclosure, when defendant, claiming to be the owner of the lands under a tax deed, brought an action to enjoin the sale and to quiet his title, and filed the bond sued on. On final hearing it was decreed that defendant held the lands as trustee for plaintiff; that the injunction be dissolved; and that defendant convey the land to plaintiff; but no direct attack was made on the injunction. *Held*, that the only costs incurred were on the trial of the issue of ownership, to which the injunction was merely auxiliary, and no recovery could be had on the injunction bond. *Thomas McDanald*, 77 Iowa, 300; 42 N. W. 301, distinguished; *Bullard v. Harkness*, (Iowa) 49 N. W. 855.

the suit, and "pay all sums of money, damages, and costs that shall be judged" against the obligators if the injunction shall be dissolved, was held not to cover the amount of a judgment enjoined by the court nor the costs and attorney's fees therein.¹ On the same principle, where defendant moved to dissolve an injunction when he was only entitled to a modification of it, it was held, in an action on the injunction bond, that he could not recover all the fees paid his attorney for services in relation to such motion.² Nor are the sureties liable for loss of profits or counsel fees incurred or expended before the giving of the undertaking, nor for counsel fees expended in defence of the suit, but only those expended solely or principally in procuring a dissolution of the injunction.³

§ 969. **Proof of Counsel Fees.** — In a suit upon an injunction bond, if attorney's fees were paid for all the services rendered in the action, including those performed in procuring the dissolution of the injunction, the party claiming damages must prove the amount of the fees that were so paid for procuring the dissolution of the injunction. A jury cannot apportion the fees paid in the action and find the value of certain services, without evidence of the same.⁴ And in such case, in the absence of any evidence as to the amount actually paid for their services, in addition to proof of what such services were worth, in order to entitle the plaintiffs to recover, it should at least be shown that the solicitors were retained upon a *quantum meruit*.⁵

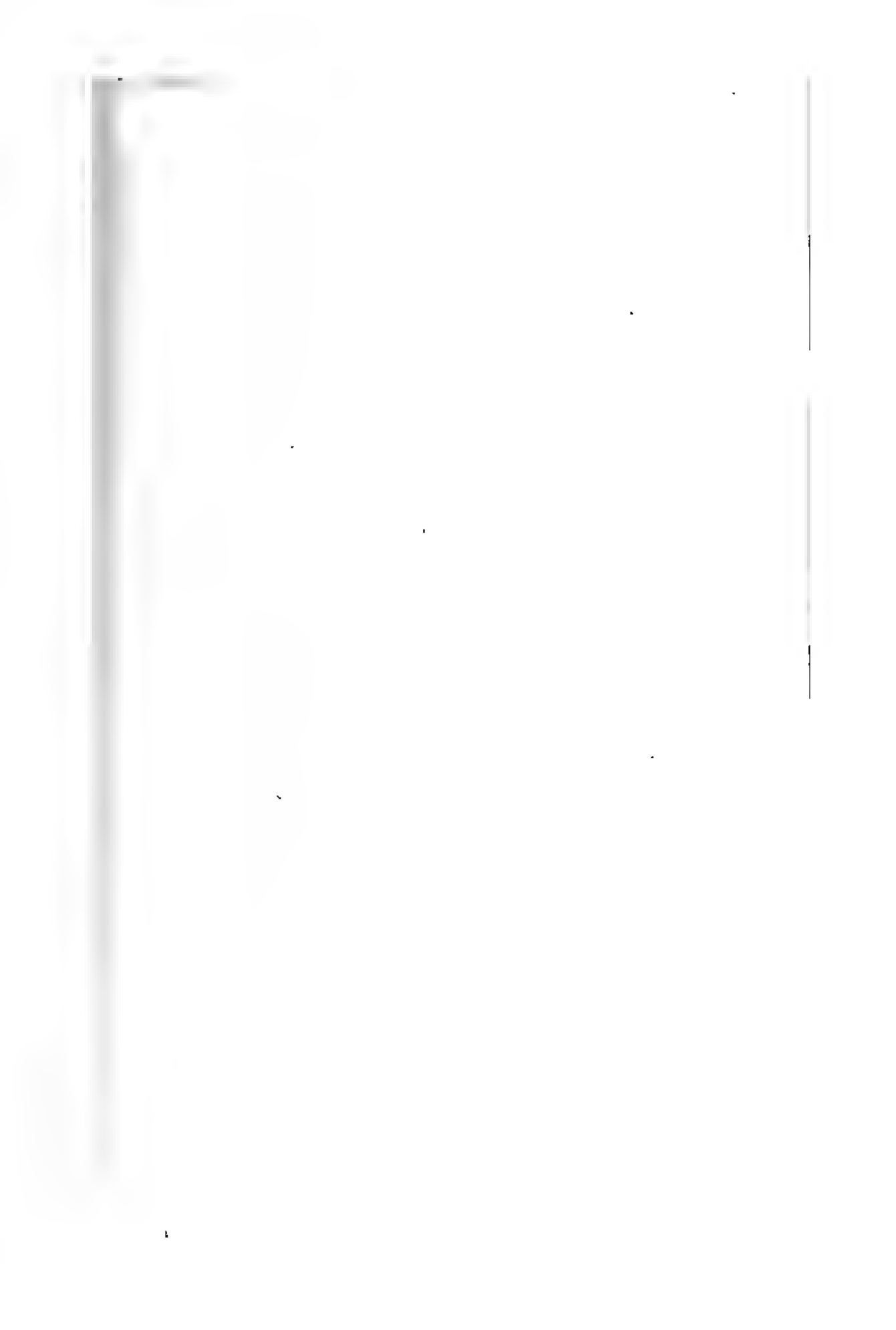
¹ *Browning v. Porter*, 2 McCrary (C. Ct.), 581.

² *Ford v. Loomis*, 62 Iowa, 586.

³ *Lambert v. Haskell*, 80 Cal. 611; 22 P. 327.

⁴ *Campbell v. Metcalf*, 1 Mon. T. 379.

⁵ *Steele v. Thatcher*, 56 Ill. 257.





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